Nos. 77-983, 78-119 and 78-139

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, *et al., Petitioners,*

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*

STATE OF WASHINGTON, *et al., Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*

PUGET SOUND GILLNETTERS ASSOCIATION, *et al., Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*

BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, *Et Al.*

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BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, ET AL.

OPINIONS BELOW

On October 16, 1978, the Court granted certiorari on three petitions (Nos. 77-983, 78-119 and 78-139) and by order dated November 13, 1978, consolidated the cases.

No. 77-983 involves the petition by the State of Washington for review of two decisions by the Washington State Supreme Court: *Puget Sound Gillnetters Association* v. *Moos,* 88 Wash.2d 677, 565 P.2d 1151 (1977) (App. D of Petition No. 77-983) and *Washington State Commercial Passenger Fishing Vessels Association* v. *Tollefson,* 89 Wash.2d 276, 571 P.2d 1373 (1977) (App. B of Petition No. 77-983). The latter case is the decision upon reconsideration of 87 Wash.2d 417, 553 P.2d 113 (1977) (App. F of Petition No. 77-983). In those decisions the Washington State Supreme Court found that United States treaties of 1854 and 1855 did not entitle treaty Indians to a special allocation of the State's harvestable fishery resource. The court further concluded that the Washington Department of Fisheries is not authorized by state law to allocate fish to Indian fishermen, but rather must treat all fishermen in the same class equally.

The State of Washington in No. 78-119 and commercial fishing groups in No. 78-139 separately petitioned for review of *United States* v. *Washington,* 573 F.2d 1123 (9th Cir. 1978) (App. A-1 of Petition No. 78-119). In that decision the Ninth Circuit upheld a specific allocation of the fishery resource and the direct control by the district court of fishing activities in western Washington as an exercise of continuing jurisdiction in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash. 1974) (JA 63), *aff'd,* 520 F.2d 676 (9th Cir. 1975) (JA 39), *cert. denied,* 423 U.S. 1086 (1976).

Also included in the petitions in Nos. 78-119 and 78-139 was a second decision by the Ninth Circuit in *United States* v. *Washington,* 573 F.2d 1118 (9th Cir. 1978) (App. A-29 of Petition No. 78-119). The Ninth Circuit concluded that the district court's determination that treaty Indians do not have to comply with certain regulations of the International Pacific Salmon Fisheries Commission, and that they are entitled to 50% of the American harvest of those fish runs, was moot.

In No. 78-139, the Court has also granted certiorari before judgment in the court of appeals to review an unreported

"preliminary injunction" of the district court (JA 487-490), entered on June 6, 1978, establishing regulations for future fishing seasons.

JURISDICTION

In No. 77-983, the judgment of the Supreme Court of Washington on reconsideration was entered on October 10, 1977. A timely petition for a writ of certiorari was filed by the State of Washington on January 2, 1978. This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

In Nos. 78-119 and 78-139, the judgments of the Court of Appeals for the Ninth Circuit were entered on April 24, 1978. The petition for a writ of certiorari by the State of Washington in No. 78-119 was filed on July 21, 1978, and the petition by the Puget Sound Gillnetters Association *et al.* in No. 78-139 was filed on July 24, 1978. The petition in No. 78-139 also sought certiorari before judgment to review the preliminary injunction of the United States District Court for the Western District of Washington entered on June 6, 1978; a timely notice of appeal from that order was filed, and the case was pending in the Court of Appeals for the Ninth Circuit as No. 78-2523. This Court's jurisdiction over both petitions rests on 28 U.S.C. § 1254(1).

TREATIES AND RULES INVOLVED

1. The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (10 Stat. 1132-1133):

> "ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States,

all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows . . . .

"ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, *** all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; . . . .

"ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing . . . ."

2. Rule 65 of the Federal Rules of Civil Procedure provides in pertinent part:

"Rule 65. INJUNCTIONS

"(a) Preliminary Injunction.

"*Notice.* No preliminary injunction shall be issued without notice to the adverse party.

* * *

"(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be

required. Every temporary restraining order granted without notice . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period . . . .

* * *

"(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

QUESTIONS PRESENTED

1. Whether the federal courts properly construed the assurance in the Stevens treaties that members of certain Indian tribes would have the right to fish "in common with" other fishermen as providing those Indians a guaranteed allocation of the harvestable fish and as excluding other fishermen from an equal opportunity to fish.

2. Whether the district court exceeded its constitutional and equitable powers by:

(a) adopting an apportionment formula effectively allocating more than half the harvestable fish to one small group of fishermen without regard to the economic impact of that allocation on the far larger group;

(b) assuming the power to enforce the treaties by creating specific allocations of fish in the absence of implementing legislation by either the federal government or the State of Washington;

(c) asserting complete day-to-day supervision and control over commercial fishing in the State, deliberately displacing the State's role in this essentially local area of regulation; and

(d) directing state officials to perform functions that under state law they lack authority to perform.

3. Whether the district court violated the due process and procedural rights of non-treaty fishermen by:

(a) holding that citizens of a State are automatically bound by rulings made in litigation to which the State was a party, despite material differences in position and the existence of substantial independent interests; and

(b) applying injunctions to the non-treaty fishermen on the basis of determinations made in a litigation to which they were not parties, and denying them an opportunity to contest the basis for the orders.

STATEMENT

I. INTRODUCTION

The petitioners on whose behalf this brief is submitted are two commercial fishing associations and their presidents. These petitioners adopt the Statement contained in the Petitioner State of Washington's Brief (at 5-35), with the following supplementation.

This is a case in which petitioners' livelihood as commercial fishermen has been virtually destroyed by the interpretation of a seemingly clear phrase in a series of Indian treaties in a way that stands the plain object of the treaties on its

head. The issue is purely one of commercial rights: whether one group of fishermen—treaty Indians—is entitled to a disproportionately large share of the commercially harvestable fish, to the exclusion of all the rest of the citizens of the State, Indians and non-Indians.

Even two of the three judges of the Ninth Circuit expressed candid doubts that the right result has been reached. Nevertheless, these petitioners, who were not even parties to the litigation in which the misinterpretation took place, have been placed under direct federal injunction and have been denied the right to contest the interpretation that threatens their life's work.

The Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association are nonprofit organizations whose members are full-time commercial gillnetters or purse seiners harvesting salmon in the Puget Sound area of Washington State.[1] In addition to the approximately 1,000 members of these associations, it has been estimated that as of 1974 there were 5,800 other commercial fishermen, 283,650 sports fishermen, and 794 Indian fishermen affected by these cases. The actual number of full-time Indian commercial fishermen is much smaller. *See* JA 23-24, 169 (FF 188).[2]

The Washington State Department of Fisheries is authorized under state law to regulate salmon fishing in the interest of conservation "so as to fully utilize the harvestable portions for the economic well-being *of the citizens as a whole.*" *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash.2d 677, 682,

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[1] The gillnetters use gillnets, which are meshes that are suspended from the surface of the water to form a wall against which the salmon collide and are entangled behind the gills. The purse seiners set their nets in a circle that is then "pursed," or closed, at the bottom to trap the fish inside.

[2] Unless otherwise noted, all factual references are to the Joint Appendix, "JA." "FF" refers to the findings of fact in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

565 P.2d 1151, 1153 (1977) (Pet. 77-983, at D6) (emphasis added). As interpreted by the Washington Supreme Court, state law does not permit the Department to apportion fish to Indian fishermen through the manipulation of conservation regulations; rather, state law requires that *all* fishermen be provided an equal opportunity to fish. *Id.*

However, commencing in 1974, Judge George Boldt of the United States District Court for the Western District of Washington began issuing decrees in proceedings, in which neither the Gillnetters nor the Purse Seiners have been parties, to allocate *well more than half* of the state fisheries to Indians who, as the figures above show, comprise a tiny percentage of the total fishermen. These orders rest on the court's interpretation of treaties executed by the United States in 1854 and 1855 with Northwest Indian "tribes" that the United States deliberately created for the purpose of extinguishing Indian claims to lands in Washington Territory. JA 107-09 (FF 17-19).

Each of these treaties provides only that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory . . . .*" JA 97-99 (FF 1) (emphasis added). As Judge Boldt himself found, "[t]he Indians were assured by [Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory] and the treaty commissioners that they would be allowed to fish, but that the white man also would be allowed to fish." JA 109 (FF 20).

Although today it is conceded on all sides that "[i]t is necessary for the fishing activity of Indians and non-Indians to be regulated in order to assure that conservation of the fishery resource is achieved" (JA 166 (FF 181)), this was not true when the Stevens treaties were negotiated. On the contrary, "[b]ecause of the great abundance of fish resources and [the] limited populations, there was no need to regulate the taking of fish by either Indians or non-Indians at treaty times." JA 103

(FF 9). *See also* JA 50, 52, 72, 109 (FF 20). Indeed, it was not until the development of a large-scale commercial fishing industry in the last decades of the Nineteenth Century that the need to implement conservation measures first arose. JA 102-03 (FF 8). Understandably, as the district court found, there is virtually "no evidence at the time of the treaties that either party intended to restrict the others fishing because it was not contemplated that they would interfere with each other." JA 113 (FF 28).

In short, contrary to the dictates of state law, the district judge has concluded that a tiny portion of the State's commercial fishermen today are entitled to more than half the salmon fishery resource. This bizarre result was held to be compelled by the language of the treaties, even though common sense and the historical evidence found by the court itself show that the treaties did not contemplate different treatment for any fishermen, Indian or non-Indian, in the event of scarcity. Moreover, to carry out this apportionment—which the state courts have held to be inequitable and, indeed, unconstitutional[3]—Judge Boldt has assumed final responsibility for management of all of Washington's fisheries, summoned a number of federal agencies to effectuate his plan, directed the State Department of Fisheries to assist the federal allocation program despite the Department's lack of legislative authority to do so, and issued injunctive orders against the Gillnetters, Purse Seiners, and others who have never been subject to the court's jurisdiction or enjoyed their day in court on the merits of the allocation program.

The impact of these extraordinary measures on the Gillnetters and Purse Seiners can scarcely be overstated. In the four years prior to the district court's initial decision in 1974, the commercial net fishing industry in the southern Puget Sound

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[3] *See Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977) (Pet. 77-983, App. B); *Puget Sound Gillnetters Ass'n* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977) (Pet. 77-983, App. D).

averaged 34 days of fishing per season.[4] In 1976, as a consequence of that decision, this allotment for gillnet fishermen like petitioners dwindled to a mere *three days*. As discussed in the State's brief (at 7-8), according to findings issued by the U.S. National Marine Fisheries Service, the average net earnings of Gillnetters dropped between 1973 and 1974 from $9,379 to $1,527, and for Purse Seiners in the same period from $30,568 to $13,026. At the same time, as a result of their age and commitment to this industry, these men have not been able to shift to new careers.[5]

To place the issues of these cases in perspective, it is necessary to review in detail the rationale by which the district court concluded that its apportionment plan was required, the different rationale by which the court of appeals affirmed it, and the irregular procedures that the federal courts have sanctioned to implement it.

II. THE FEDERAL APPORTIONMENT PLAN

A. As Adopted By The District Court In 1974

In his initial decision in 1974 Judge Boldt concluded that the Department of Fisheries is required to implement a complicated formula for apportioning fish between the 794 treaty Indian fishermen and the remaining 290,250 fishermen, most but not all of whom are not Indians. *United States* v.

[4] See K. Henry, *Background Document on Northwest Salmon Fisheries* (U.S. Dep't. of Commerce, August 1977) Table I.

[5] According to the Service's findings, the average number of years spent in commercial fishing by individual gillnetters is 16; for purse seiners, this figure is 28.

Evidence concerning the impact of the federal court's apportionment plan on the Gillnetters and Purse Seiners is scant in the record before the Court, since the associations were not parties to any of the original proceedings in the district court, and then were expressly denied the opportunity to submit such evidence when the district court summarily extended its decrees to them.

Washington, 384 F. Supp. 312 (W.D. Wash. 1974).[6] Although the district judge filed a lengthy opinion and elaborate findings of fact and conclusions of law, the only explanation given by the court for any apportionment at all appears in the following single paragraph:

> "By dictionary definition and as intended and used in the Indian treaties and in this decision 'in common with' means sharing equally the opportunity to take fish at 'usual and accustomed grounds and stations'; *therefore*, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above."

Id. at 343 (emphasis altered; footnote omitted).

In short, Judge Boldt determined that it is necessary to divide fishing opportunities equally between treaty Indians as a group and all other non-treaty fishermen merely because of the treaty language providing rights for all persons to fish "in common" with each other. Significantly, in the 1974 decree the court undertook to assure an "opportunity" for the treaty Indians to take at least 50% of the harvestable fish, not to guarantee that they actually achieve that level of success.

The formula adopted by the court and still in effect is considerably more complex than a 50-50 split. Specifically, the court's apportionment plan calls for the treaty Indians to have the opportunity to take 50% of the total number of fish within the State's regulatory jurisdiction that, absent harvest en route,

[6] The Indian beneficiaries of the apportionment even include a group of intervening "tribes" not recognized by the United States. These individuals are allowed to fish without licenses if they satisfy the court of their "blood quantum." In addition, the district judge awarded the same special privileges to these Indians as to the members of recognized treaty tribes if they are invited to fish by one of those tribes.

would be available for harvest at the treaty Indians' usual and accustomed fishing places, subject to the following adjustments:

> —Subtract from the total number of fish subject to apportionment not only the number of fish necessary for adequate escapement to preserve the fish run, but also the number of fish taken by the Indians on the reservation and the number of fish they say they want for subsistence and ceremonial uses.
>
> —Further adjust the Indian allocation upward and the non-treaty allocation downward to compensate for the disproportionate number of fish that non-Indian fishermen take in the ocean outside the State's regulatory jurisdiction.

Id. at 343-44. The number of fish that the Indians may take, free from apportionment, on the reservation, for subsistence, and for ceremonial use rests in the Indians' discretion. *See id.* at 417 (¶ 17). Moreover, fish caught by the Indians in all-citizen fisheries (as distinguished from their reservations and other "usual and accustomed" places) are not counted toward the Indian share, but are included in the non-Indians' share. *Id.* at 409-10 (¶ 7). In addition, despite the fact that the Department of Fisheries has "contributed significantly to Indian catches" through the state-financed planting of hatchery-reared fish (JA 177 (FF 210)), artificially propagated fish are subject to the 50%-plus allocation.[7]

B. As Affirmed By The Court Of Appeals In 1975

The court of appeals sustained the apportionment as ordered by the district court, but relied on an entirely different theory. Rather than rest the allocation on the language of the

[7] The district court specifically ruled that entirely artificially propagated runs are subject to apportionment. *Id.* at 411 (¶ 19). Although initially the court refrained from deciding whether the same rule governs individual hatchery-reared fish in mixed runs, *id.* at 344-45, the apportionments ordered by the court since then have applied to these fish. *See* JA 3, 26-27.

However, the "permanent" determination whether treaty rights extend to hatchery fish is supposed to be decided in a second phase of this case (Phase II), presently pending.

treaties, the court analogized the suit to an application for an equitable partition of property held by co-tenants—here, assertedly, the treaty Indians as a group and all others as a group. *United States* v. *Washington*, 520 F.2d 676, 686 n.3, 687 (9th Cir. 1975). The court of appeals also affirmed the specific allocation formula adopted by the district court.[8]

Treating the details of the apportionment as subject to "a great amount of discretion" in accordance with the equitable partition theory, the court of appeals ruled that the lower "court's apportionment was well within its discretion." The court reasoned that the 50-50 allocation "reflects the equality existing between the two bargaining parties and [since the Indians allegedly regarded the right to fish as a communal property right belonging to the tribe] best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties." *Id.* at 687-88.

[8] The court ordered one modification concerning the adjustment for fish taken outside the State's jurisdiction. The court held that this extra adjustment in favor of the treaty Indians should not take account of fish caught by non-Washingtonians, since "[t]he treaty granted equal rights at the traditional areas to Washington citizens, and their ability to fish is equally impaired by foreign fishing." *Id.* at 689.

The fish catch giving rise to "equitable adjustment" does, however, include fish taken in the American/Canadian fishery regulated by the International Pacific Salmon Fisheries Commission (IPSFC) and in the 200-mile offshore fishery regulated by the United States under the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, over which the State of Washington and the non-treaty fishermen have no control. Because the United States controls the take in the 200-mile offshore troll fishery, it can ask the district court to compel the non-treaty petitioners to contribute their share to the Indians for what the United States has given away elsewhere in the 200-mile offshore fishery.

By the use of this "equitable adjustment" principle, the district court could prevent the non-treaty petitioners from ever fishing again in waters over which the State has jurisdiction, since a substantial percentage of fish otherwise destined for Washington waters are taken in the IPSFC and the 200-mile offshore fishery.

The court of appeals also specifically upheld the exclusion from apportionment of fish taken on the reservation because only the Indians enjoyed the right to fish on the reservation under the treaties. *Id.* at 690. Finally, the court of appeals affirmed the lower court's ruling concerning fish used for tribal ceremonies or subsistence, noting that this was uncontested by the State. *Id.* The court thus did not find it necessary to discuss the district court's rationale for this ruling—namely, that the opportunity to take fish for these purposes was and remains a matter of utmost concern for the Indians. 384 F. Supp. at 343.[9]

C. As Implemented By The District Court On Remand

In issuing his original decree, Judge Boldt ordered a stay pending appeal, subject to the condition that the Department of Fisheries "make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision . . . ." *Id.* at 420 (¶ 5). The Department complied with this directive by promulgating regulations limiting both commercial and sports fishing. *See* JA 1.

Following the denial of certiorari by this Court, 423 U.S. 1086 (1976), however, the district court adopted a revised apportionment plan for 1977 based on certain unstated "facts, circumstances and equities peculiar to this year's salmon runs."[10] Despite the fact that the court's initial decision was based on the conclusion that a 50-50 allocation was required as a matter of law, the court now provided for a different apportionment to the Indians for many of the runs, varying from 37% to 48%, for an overall allocation of 45%. *See* Memorandum Order and Preliminary Injunction, Aug. 31, 1977, Pet. 78-119, at A44 *et seq.* However, while the 1974

[9] The numbers of fish taken by the Indians on the reservation for subsistence and ceremonial purposes are not trivial. *See, e.g.*, Memorandum Order and Preliminary Injunction, Aug. 31, 1977, Pet. 78-119, at A43-A44.

[10] In a similar vein, the court stated without explanation that the 1977 allocations "shall not be interpreted in any way as an express or implied modification" of the court's earlier decision.

decree had spoken only of an "opportunity" for treaty Indians to take 50% of the catch—a fact stressed by the Solicitor General in opposing certiorari[11]—the court's 1977 decree and its successors are devoted to guaranteeing a disproportionately successful catch for each treaty Indian by banning fishing by non-treaty net fishermen. Moreover, unlike the regulations originally promulgated by the Department of Fisheries, the 1977 order effectuates allocations through limitations only on commercial net (as opposed to recreational) fishing. *See* Preliminary Injunction re: Enforcement of 1977 Fisheries, Sept. 27, 1977, Pet. 78-119, at A89 *et seq.*

On June 6, 1978, the district court adopted similar orders for the 1978 fishing season and subsequent years. *See* JA 479-90. Without explanation, however, the court reverted to the original 50%-plus formula in favor of the treaty Indians, despite the economic impact of the apportionment program on the commercial fishing industry. JA 482 (¶ 1). The court concluded that "[t]he rights of the treaty and non-treaty fishermen have already been adjudicated, therefore economic disruption associated with implementing the 1974 decree is not legally cognizable." JA 483 (¶ 4).

D. As Affirmed By The Court Of Appeals On The Second Appeal

Adhering to its co-tenancy analogy on a second appeal, the court of appeals sustained the district court's special allocation for 1977 as an "exercise of discretion." *United States* v. *Washington*, 573 F.2d 1123 (9th Cir. 1978). Two members of the panel did so, however, only because they felt bound by the earlier decision of the court of appeals; Judges Kennedy and Wallace separately expressed their doubts "that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights." *Id.* at 1136. In any event, noting that "the state does not appear to quarrel seriously with the specific allocation" and that the "allocation can best be

[11] *See* Br. of the United States in Opposition, Nos. 75-588, 75-592, 75-705, at 20.

expressed and enforced . . . by numbers of fish taken," the court stated that "[t]he numbers question is one of degree, not one of principle." *Id.* at 1130 & n.6.

III. FEDERAL MANAGEMENT OF WASHINGTON FISHERIES

The district court's original 1974 decree was lengthy and complex. Among other things, it prohibited the adoption or enforcement of any Department of Fisheries regulation that would limit the harvest of fish by treaty Indians unless the Department first satisfied the court of the conservation need for the regulation and that the State's regulatory program provided for the allocation set forth in the court's opinion. *See* 384 F. Supp. at 413-19. It also required the State to issue revised regulations in accordance with the allocation ordered.

When the commercial net fishermen asked a state court to enjoin the Director of Fisheries from adopting the regulations ordered by the district court, on the ground that the Director has no statutory authority to do so under state law, the district court, on oral motion by the United States without notice, on August 6, 1975 (Docket No. 1240), enjoined the state court from any further proceedings in the matter. *See Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977).

The district court, however, refused to issue a similar injunction relating to the recreational fishery when the non-treaty recreational fishermen sought and obtained an injunction prohibiting the Director from reducing the sport fishing catch. The state court held that the Department had no statutory authority to allocate fish for the apportionment purposes mandated by the federal courts, and could not lawfully comply with the federal decree to that effect. The court also ruled that the treaties did not justify any allocation. *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977) (Pet. 77-983, App. B); *see also Puget Sound Gillnetters Association* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977) (Pet. 77-983, App. D).

Judge Boldt responded in August 1977 by assuming control over all allocations and by removing from state regulatory jurisdiction all fish allocated to the Indian fisheries. He also enjoined the Department "to manage and regulate the harvest of the portions of such runs not herein removed from the defendants' jurisdiction and control in such manner as will assure the escapement from non-treaty harvest of the numbers of fish allocated to propagation escapement and to the treaty fisheries . . . ." Memorandum Order and Preliminary Injunction, Aug. 31, 1977, ¶¶ D-F, Pet. 78-119, at A56-A57. At the same time, he adopted an elaborate plan "establish[ing] guidelines for management of salmonid resources originating in or passing through Washington waters from the mouth of" Puget Sound. The plan included authorization to a previously established Fisheries Advisory Board composed of one representative of the State, one from the tribes, and the court's own fishing expert to resolve disputes under the plan. Memorandum Adopting Salmon Management Plan, Aug. 31, 1977, Pet. 78-119, at A62-A63, A75-A76.

Shortly thereafter Judge Boldt issued an injunction ordering the Gillnetters and Purse Seiners, among other commercial net fishermen, not to take, possess, or sell salmon without first determining from a telephone "hot-line" that the area to be fished is open for non-Indian fishing pursuant to the court's allocation scheme. The decree also directed the State to maintain the "hot-line," to serve the injunction on fishermen, and along with the United States to cite any individual with notice of the order who fished in violation of it. Preliminary Injunction re: Enforcement of 1977 Fisheries, Sept. 27, 1977, Pet. 78-119, at A89 *et seq.* *See also* Preliminary Injunction Order, Oct. 17, 1977, Pet. 78-119, at A93 *et seq.*

The injunctive provisions now in effect for the 1978 fishing season and later years are even more elaborate. In addition to enjoining any fishing not authorized pursuant to the "hot-line" procedure and directing the State to maintain reasonable surveillance to enforce the decree, Judge Boldt's order of June

6, 1978 specifically enlists and deputizes personnel of the National Marine Fisheries Service, the Coast Guard, and the United States Marshal's Service, in addition to the State Department of Fisheries, to assist in the enforcement of the decree by various means, including the boarding of vessels "upon suspicion." Preliminary Injunction re: Enforcement of Limitations on Nontreaty Salmon Fisheries for 1978 and Subsequent Seasons, June 6, 1978, Pet. 78-139 at C1 *et seq.* [12]

In sum, the ultimate authority for management of Washington's fisheries is now in the hands of a federal judge, operating through specially conscripted state and federal deputies. The court has assumed responsibility for approving the adoption of state conservation regulations, providing for the allocation of fish, and supervising and enforcing compliance.

IV. ASSUMPTION OF JURISDICTION OVER THE GILLNETTERS AND PURSE SEINERS

A. The Orders Reviewed By The Court Of Appeals

Neither the Gillnetters nor the Purse Seiners were joined as parties in the original federal proceedings. Indeed, although the Purse Seiners were allowed to file a brief as *amicus* in the district court, their motion to intervene was denied.[13] Nonetheless, as noted above, in August and September 1977 the district court issued a series of *ex parte* orders purporting to regulate the fishing activities of the Gillnetters, the Purse Seiners, and other commercial net fishing interests directly.

The first order issued by the judge directly against nontreaty fishermen was a Memorandum, Order and Preliminary Injunction signed and issued on August 10, 1977, which

[12] Federal officers have, in fact, cited many fishermen for violating court orders in 1978; one third of these have been Indians. Tr., Nov. 3, 1978, at 14, 25. *See also* JA 482 (¶ 25).

[13] Judge Boldt denied the applications of several non-treaty fishing groups for permission to intervene. By contrast, all such applications by Indian tribes (26 so far, including some officially recognized tribes) have been granted.

generally declared that "[n]ontreaty fishermen shall not fish" for salmon "unless prior approval is obtained from the Court or the Court's Fishery Advisory Board."[14] On August 31, 1977, without advance notice to petitioners, Judge Boldt issued a temporary restraining order that specifically assumed jurisdiction over thousands of people who had never been parties to the case—petitioners and all other fishermen licensed by the State—and enjoined them from fishing except with his permission.[15] Despite the requirement in Rule 65(b) of the Federal Rules of Civil Procedure, which permits *ex parte* TRO's only when the affected person cannot reasonably be notified of the application, there is nothing in the record to indicate what efforts were made to give notice and the reasons supporting the claim that notice should not be required.[16]

On September 12, 1977, an order was entered extending this temporary restraining order. Again no prior notice was given to petitioners. On September 22, 1977, the district court issued a "preliminary injunction" prohibiting all gillnet and purse seine fishermen from taking salmon from the Straits of Juan de Fuca in Puget Sound. Like the earlier orders, the preliminary injunction was issued without prior notice to any

[14] Apparently upon realizing that the terms of this order applied to all nontreaty harvesters of salmon including recreational fishermen, the court on August 12, 1977, issued a Minute Order specifically excluding recreational fishermen from the terms of the August 10 decree.

[15] *Compare Carroll* v. *Presidents and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968), invalidating an *ex parte* temporary restraining order issued to persons "without any effort, however informal, to invite or permit their participation in the proceedings."

[16] The August 31 order provided in part (Pet. 78-139 at E2):

"1. All reefnet, gillnet and purse seine fishermen licensed by the State of Washington, Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, . . . and all persons in active concert or participation with them are hereby temporarily restrained from engaging in, taking, possessing, or selling salmon of any species in violation of this court's orders of August 10, 1977 or August 31, 1977 or state regulations adopted pursuant to the orders of this court."

commercial fishermen. On September 27, 1977, the district court entered another "preliminary injunction," closing Puget Sound to all non-treaty net fishermen

> "unless such person has first ascertained from the Washington Department of Fisheries telephone 'hotline' . . . . that that the area to be fished is open for fishing by non-treaty fishermen at the time the individual intends to fish . . . ." Pet. 78-119, at A89-A90.

On appeal the court of appeals dismissed challenges to the pervasive non-compliance with Rule 65 as "technical attacks . . . . We find them to be without merit." *United States* v. *Washington, supra,* 573 F.2d at 1133 n.16. In addition, the court sustained the application of the September 27, 1977 injunction to non-parties on the fiction that they are "privies" of the State, which had been a party to the litigation from the outset. The court reasoned:

> "[U]nder Washington law the citizen's right to take fish is purely derivative of the state's power to regulate rights in the fish. The fisher's interest is therefore derivative of the state's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party." 573 F.2d at 1132.

Evidently recognizing that the State was an inadequate representative of the interests of the Gillnetters and the Purse Seiners, the court lamely concluded that "[a]ny complaints the fishers may have concerning the state's representation of their interests are matters between them and the state." *Id.* at 1133.

As a result of the issuance of the September 27, 1977 injunction, a number of commercial net fishermen were cited during the 1977 Puget Sound salmon fishery for criminal contempt. As of the date of this brief, five are presently serving jail terms of up to 60 days as a result of conviction for criminal contempt.

B. The Later Orders

On December 7, 1977, Judge Boldt ordered the State of Washington not to issue any net salmon fishing licenses for 1978 or subsequent seasons. He set a hearing on the United States' motion for an injunction comparable to the one issued in 1977 and directed that any individual or organization wishing to appear at that hearing should file a notice of appearance and a memorandum setting forth any objections to the proposed 1978 injunction. Pet. 78-139, App. I. Copies of this order and the proposed injunction were served on a large number of commercial fishermen.

At the hearing on the proposed injunction, which was held April 5, 6 and 24, 1978, several fishermen appeared represented by counsel and a larger group appeared *pro se.* Neither petitioner Puget Sound Gillnetters Association nor petitioner Purse Seine Vessel Owners Association participated in the hearing. When counsel for an individual fisherman attempted to clarify the extent to which the non-treaty commercial fishermen would be authorized to participate in the hearing, the court emphasized their non-party status.[17] The testimony that

[17] "Mr. Yates: You indicated we can present testimony. Do we have the authority to subpoena witnesses?

"The Magistrate: To subpoena persons?

"Mr. Yates: Yes.

"The Magistrate: I would say no.

"Mr. Yates: O.K.

"The Magistrate: As a nonparty, I would say no.

"Mr. Yates: We do not. Do we have the authority to use interrogatories, requests for admission, the other discovery devices contained in the rules?

"The Magistrate: I would again, as a nonparty, say no." JA 541.

Judge Boldt later acknowledged that "[t]he fact that [the commercial fishermen] are not parties to this lawsuit has placed restrictions on the scope of their participation." The court also acknowledged that the Magistrate before whom the hearing was held had been powerless to grant the status of party to any non-party. JA 480 (¶¶ 11-12).

was permitted during the hearing was restricted to a determination of the need for the enforcement mechanisms contained in the proposed injunction. The court specifically precluded inquiry (JA 538-41) into the economic impact that would result from the enforcement of the 50%-plus allocation scheme that Judge Boldt had adopted in his original decision.

On June 6, 1978, still another "preliminary injunction" was entered, dealing with the enforcement of limitations on non-treaty salmon fisheries for 1978 and subsequent seasons. By the terms of that order (Pet. 78-139, at C2):

> "All gillnet, purse seine and reefnet fishermen licensed by the State of Washington, all other persons who attempt to net or assist in netting salmon in . . . [Puget Sound], the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, . . . and all persons in active concert or participation with them, are hereby enjoined and prohibited from taking, attempting to take, or offering for sale, salmon of any species taken from such waters, or assisting in any of the foregoing, unless such person has, within the previous twenty-four hours, ascertained from the National Marine Fisheries Service telephone 'hot line' . . . that such fishing in the area in which the individual intends to fish is not prohibited by this court at the time of such fishing . . . ."

The injunction further subjects the commercial fishermen to sweeping—and perhaps unprecedented—enforcement powers conferred on government agents (Pet. 78-139 at C3):

> "4. Personnel of the National Marine Fisheries Service, the Coast Guard, the United States Marshal's Service and the Washington Department of Fisheries and persons lawfully deputized by any such agency *may board fishing vessels for the purpose of investigating suspected violations* of this injunction.
>
> "5. At the direction of any enforcement agent . . . all . . . [non-treaty fishermen] are hereby *ordered to stop their vessels, permit boarding* by enforcement agents, *permit themselves* and their vessels *to be photographed*, permit their catch to be examined, identify themselves and their vessels to the satisfaction of the boarding enforcement agents, *and produce* either a valid Washington Department of Fisheries net salmon fishing license or a valid treaty Indian *identification card* for the then current fishing season which, by this order, all fishermen are required to carry when engaged in any salmon fishing activity described . . . . Any fisherman failing to identify himself as provided herein may be placed under arrest . . . ." (Emphasis added.)

As a result of this injunction, more commercial net fishermen have been cited for criminal contempt and are presenting awaiting trial on that charge.

This order was appealed to the Ninth Circuit, and is now before this Court on certiorari before judgment.

SUMMARY OF ARGUMENT

I

The decision by the federal courts below takes the simple language of the Stevens treaties and gives it an effect that is not justified either by its plain meaning or by its historical understanding. The treaties assured the Indians the right to fish "in common with" the newly arriving settlers of the territory. Nothing in that phrase suggests that there was any expectation that the harvestable fish would be or could be mathematically apportioned between the treaty Indians and the rest of the populace as separate groups. There is certainly nothing in the text of the treaties that provides a foundation for the decision by the federal courts to exclude non-treaty fishermen from the opportunity to fish at all, in order to guarantee the treaty Indians a certain proportion of the harvestable catch.

Moreover, the available historical evidence demonstrates that the natural meaning of the phrase "in common with" was the one understood by both parties to the treaties. The Anglo-American understanding of a "common fishery" was that all persons are entitled to undivided access to it. The attempt by the court of appeals to justify a proportionate allocation by using a "co-tenancy" analogy is wide of the mark because that concept has no application to common fisheries, as the treaty negotiators well knew. Contemporaneous documents manifest the intent of the parties that, while the Indians' right to fish at their usual and accustomed places was to be protected, the right of other people to fish as well was also to be secured. The rights guaranteed by the treaties consist of the equal opportunity of each individual fisherman to pursue that effort, and those rights are not properly or fairly apportioned between treaty Indians as a group and others as a group.

Indeed, the prior decisions of this Court construing the Stevens treaties confirm that the treaties confer rights of equal dignity on individuals, Indian and non-Indian alike. As a result, any apportionment, which necessarily prefers some individuals over others, flounts the essential guarantee of the treaties themselves. Moreover, such disparate treatment violates the Equal Protection Clause of the Constitution, since there is no difference between Indian and non-Indian fishermen that justifies any favoritism in the regulation of fishing opportunities.

II

A. The allocation designed by the district court is unsupportable even without regard to the absence of a foundation for an apportionment in the treaties themselves. The formula constructed to guarantee the treaty Indians a definite proportion of the total harvestable catch does not reflect any sound exercise of discretion; indeed, the district judge treated his percentage allocations as a product of legal compulsion, and he deliberately refused to weigh the economic hardships being

inflicted on thousands of non-treaty fishermen whose livelihoods have been virtually destroyed by his decrees.

Beginning with the assumption that treaty Indians as a group should be guaranteed half the harvestable catch—even though Indians make up only a tiny fraction of the commercial and recreational fishermen in the State—the district judge compounded the error of his apportionment by conferring still further premiums on the Indians. The allocated shares are so disproportionate to the respective numbers of affected fishermen that the district judge's plan makes a mockery of elemental notions of equity and the equal protection of the laws.

B. The district judge also overstepped his judicial function by undertaking to enforce these treaties according to his own design, without the guidance of implementing federal or state legislation. Treaties are normally not self-executing when their terms constitute a general commitment that leaves open a wide range of policy choices and requires extensive administrative machinery. In deciding to enforce these treaties himself, the district judge improperly devised his own elaborate mechanisms that have ultimately come to establish the district judge as master of the State's fisheries, with various federal and state agencies under order to police the detailed and far-ranging restrictions he has imposed.

C. Contrary to a basic principle of federalism, the federal courts here have sought to order state agencies to take official enforcement action beyond the scope of the powers the agencies have been given by the state legislature. The people of the State of Washington, acting through their elected representatives, have decided to authorize state officers to regulate the State's fisheries only for the purpose of promoting conservation. The federal courts lack the power to impose upon the State the obligation to enforce a mathematical allocation of fish among groups of fishermen solely because the federal courts have concluded (wrongly, we submit) that treaties allow certain Indians to harvest a disproportionate share of the resource.

III

A. Non-treaty fishermen like petitioners were not parties to the litigation in which the United States and treaty Indians joined in an effort to force the State of Washington to allocate a specific share of the fish to the Indians. Despite this exclusion, the lower federal courts have ruled that the non-treaty fishermen are bound by the rulings that are adverse to their interests because they assertedly were in "privity" with the State. Due process, however, prevents the courts from holding that non-parties are bound by the outcome of a litigation unless one of the parties to that litigation was a legally adequate representative of their interests.

That could not be true here, however, since, to the extent that the State was in "privity" with its citizens, it was equally in privity with all of its citizens, including the treaty Indians. Since under the "privity" theory the State therefore had conflicting interests imputed to it, it cannot be regarded as the legally adequate representative of any group or person with distinct interests. Moreover, throughout the course of the federal and state court litigations, the State has taken various positions that diverge from the views of the non-treaty fishermen or that conflict with their interests.

B. There can be no privity sufficient to bind a non-party unless there is a true identity of interests between party and non-party, but here the non-treaty fishermen had distinct, independent interests. Those cases in which a state has been treated as an adequate representative of its citizens have involved situations in which all its citizens were similarly situated. In the cases now before the Court, however, various groups of Washington citizens are arrayed against each other. It is a pure fiction to pretend that one group of the State's citizens may fairly be bound by the earlier litigation on the assumption that the State was representing them.

C. Finally, the federal district judge violated both due process and Rule 65 of the Federal Rules of Civil Procedure by

extending his injunctions directly to petitioners, who had not been parties to the litigation in which the underlying rulings were made. Petitioners have never had their day in court and have been repeatedly denied the opportunity to contest the premises on which the injunctions rest. Rule 65 allows a federal court to apply its orders to non-parties only when they are acting in concert with a party in an attempt to evade the court's decrees or are resting on a common legal right. Neither of those conditions is satisfied here, since petitioners and the State have been acting at arm's length—and have actually been in conflict on various aspects of this situation—and the State's unquestioned power to regulate commercial fishing does not make the State's rights and interests legally identical to those of commercial fishermen like petitioners.

For all these reasons, the federal orders must be set aside.

ARGUMENT

I. THE TREATIES PROVIDE NO BASIS FOR THE APPORTIONMENT OF FISH.

A. Apportionment Is Fundamentally At Odds With The Stevens Treaties Themselves And With The Equal Protection Of The Law.

The lower federal courts have split the Washington State fishing industry into two *groups*—Indians and non-Indians—to which fish are to be apportioned. Because of the population disparity between the groups, the necessary consequence is that some individual fishermen have been accorded a dramatic preference over others. This result is inconsistent with the very treaties on which the apportionment is said to be based.

The treaties state that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to *said Indians*, in common with *all citizens* of the Territory . . . ." It seems obvious that this language was intended to

accord individual Indians and individual citizens the right to fish at the Indians' accustomed fishing places. As the Court said in *United States* v. *Winans*, 198 U.S. 371, 381 (1905), the language reserves a non-exclusive right to fish "to every individual Indian, as though named" in the treaty. *Cf. McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 181 (1973). The Court has held on other occasions that this language also establishes "rights of the non-Indian citizens of Washington," *Puyallup Tribe, Inc.* v. *Department of Game of the State of Washington*, 433 U.S. 165, 176 & n.16 (1977) (*Puyallup III*), which the courts must strive "to accommodate [with] the rights of Indians . . . ." *Department of Game of the State of Washington* v. *Puyallup Tribe*, 414 U.S. 44, 49 (1973) (*Puyallup II*).). *See also Puyallup Tribe* v. *Department of Game of the State of Washington*, 391 U.S. 392, 398 (1968) (*Puyallup I*). The decisions below, however, subordinated the rights of one group of commercial fishermen to the rights of the other group at what were declared to be "common" fisheries.[18]

The essential point is that the parties to the Stevens treaties themselves perceived the rights of all fishermen, Indian and

[18] Treaty Indians today effectively enjoy greater freedom to fish than other citizens. *See Tulee* v. *Washington*, 315 U.S. 681 (1942) (immunity from fishing license fees); *United States* v. *Winans*, *supra* (easement to fishing grounds); Wash. Rev. Code §§ 75.28.450 *et seq.* (limitations on commercial fishing licenses; not applicable to treaty Indians). But this is not inconsistent with the equality of rights under the treaties. The Indians' superior freedom to fish today arises merely because the State of Washington succeeded to the plenary powers of the federal government over only the non-Indian citizens of the Territory when the State was admitted to the Union. As Mr. Justice Douglas explained, "A 'right' which the Federal Government grants an Indian may 'not be qualified or conditioned by the State,'" apart from "conservation measures, applicable to all . . . ." *Antoine* v. *Washington*, 420 U.S. 194, 211 (1975) (Douglas, J., concurring) (quoting *Puyallup I*, 391 U.S. at 399). *See generally Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962).

non-Indian, to be of equal dignity.[19] Indeed, the Court has already declared that there is a principle "of equal protection implicit in the phrase 'in common with,'" *Puyallup I*, 391 U.S. at 403. The treaties' description of the specific right in question—the right to fish "in common"—compels the conclusion that all individual fishermen must be treated equally. In short, the right of "said Indians [to fish] in common with all citizens" can hardly be turned into a right to exclude citizens from equal fishing opportunities. To allocate more fish to some individuals simply because they are Indians thus stands the treaties' central assurance of equal individual rights on its head.

Only last Term in *University of California Regents* v. *Bakke*, 438 U.S. ____, 98 S. Ct. 2733 (1978), this Court underscored that the focus of the Equal Protection Clause of the Fourteenth Amendment is on the rights of individuals. As Mr. Justice Powell stated there:

> "The guarantees of the Fourteenth Amendment extend to persons. Its language is explicit: 'No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. They are personal rights' . . . ." 98 S. Ct. at 2748 (citations omitted).

[19] Although the district court below blinded itself to this truth, *see* 384 F. Supp. at 332, the court of appeals so held in clarifying the equitable adjustment to be made to the 50-50 allocation for fish taken outside the State's regulatory jurisdiction. "The treaty," the court of appeals correctly noted, "granted equal rights at the traditional areas to Washington citizens . . . ." 520 F.2d at 689. *See also* 573 F.2d at 1128 ("[t]he rights of each sovereign are reserved or granted in the treaties"); Br. for the United States, Nos. 78-119 and 78-139, Sept. 1978, at 24 (recognizing the existence of "rights possessed by all citizens of the State to fish 'in common' with the treaty Indians"). Inexplicably, the court of appeals failed, however, to give effect to this fact in approving the district judge's apportionment plan.

The federal courts below have simply ignored this fundamental truth. In response to petitioners' equal protection challenge to the apportionment program, the court of appeals specifically ruled that comparisons of the numbers of Indian and non-Indian fishermen and the quantity of fish that each is allowed to take is "irrelevant under the law" as a result of the treaty parties' alleged co-tenancy. The Indians obtain their rights and fish under the regulation of one co-tenant, the tribes, said the court, while the non-Indians derive their rights and fish under the regulation of another, the State as the successor to the United States. "The population-head-count disparity," the court concluded, "is the unremarkable result of normal principles of property law applied to changing numbers within cotenant classes." 573 F.2d at 1128.

The fictions indulged by the court of appeals do not assist its analysis because they do not establish a classification that has any relation, let alone a fair and substantial one, to the object of apportionment. Indians and non-Indians alike have the right to fish in common at the Indians' customary fishing grounds, and both are subject to state conservation regulation in the exercise of this right. The sole difference between them is that the State can regulate the treaty Indians only in the interest of conservation. But this difference cannot justify disparate treatment of individual non-Indians through apportionment. Under the court of appeals' own co-tenancy rationale the need for apportionment arises only because of the present scarcity of the resource and the need for conservation.

In short, since both Indians and non-Indians are subject to the State's conservation control, any favoritism in the regulation of fishing opportunities flouts the guarantees of the Equal Protection Clause by failing to treat similarly circumstanced persons alike. As the state courts have concluded, there is no basis for "an allocation of more than 50 percent of a natural resource of a state to a group of citizens comprising a little more than .028 percent of the population . . . ." *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson, 89 Wash. 2d 276, 571 P.2d 1373,1373 (1977).*

B. The Rationales Adopted By The Lower Federal Courts To Justify An Apportionment Are Untenable.

The allocation program ordered by Judge Boldt and approved by the court of appeals defies simple common sense. Under this program a *single* treaty Indian fisherman would be entitled to harvest *more fish than* all of the State's other fishermen combined. Likewise, under the 50-50 entitlement, the Makahs, whose customary fishing grounds are at the entrance to Puget Sound, together with the citizens of the State would be able to take under the Treaty with the Makah *all* of the harvestable salmon passing their customary grounds, to the complete exclusion of the other tribes below the Makahs in the migratory flow.

Moreover, even the dictionary definition relied on by Judge Boldt to support his decision belies his interpretation, when the Court considers the portion of the definition that, curiously, he neglected to quote. JA 111 (FF 24). This excluded portion of the definition of "common" from a contemporary dictionary states: "The right to a highway is common."[20] This usage is particularly significant since the Yakima treaty (12 Stat. 915; A-133 Pet. 78-119) specifically refers to the use of the highway. The paragraph immediately preceding the reference to fishing rights in Article III in the Yakima treaty secures for the Yakima Indians, ". . . the right, *in common with* citizens of the United States, to travel on all public highways." (Emphasis added.) Under the normal rules of construction, identical language in the same instrument should be identically construed. Applying Judge Boldt's interpretation of that phrase, however, would give the Yakima Indians the right to control half of the highways in the State of Washington and to exclude non-treaty citizens of the United States from using them.

It is evident, therefore, that Judge Boldt's unnatural interpretation of the phrase "in common with" is facially inequitable

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[20] Webster's *American Dictionary of the English Language*, (1862 ed.). JA 325.

and textually unsupportable. It is absurd to suppose that Governor Stevens or the Indians intended any such results, or would have intended them if they had anticipated conditions of scarcity. As the Washington Supreme Court aptly observed:

> "[I]t is inconceivable that the parties to the Treaty contemplated an allocation of the fish or an advantage of one over the other in the manner of taking fish. The fish were there for the taking. It was important only for the Indians to enjoy the right of taking fish in common with, *i.e.*, on an equal basis with, the citizens of the territory. This is exactly what the parties must have intended." *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wash.2d 664, 548 P.2d 1058, 1067 (1976).

The State in its brief (at 42-63) has convincingly demonstrated on the basis of the actual historical evidence that the parties to the Stevens treaties agreed to establish a common fishery in which Indians and non-Indians alike would enjoy an equal opportunity to fish. Contrary to Judge Boldt's analysis, the "in common" language of these treaties simply does not support the conclusion that the parties meant to divide the resource itself and to give Indians as a group the right to exclude others from the opportunity to fish. This conclusion in no way denigrates the importance of the treaties for the Indians. The treaties, after all, secured and guaranteed to them substantial rights that they would not otherwise have had: access to fishing grounds off their reservations and freedom to fish there on an equal footing with citizens of the Territory. *See Department of Game* v. *Puyallup Tribe, Inc., supra*, 548 P.2d at 1069-70.[21] The Indians, of course, were not citizens at the time of the treaties and thus had only those rights conferred upon them in treaty negotiations.

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[21] Those rights now also allow treaty Indians to fish commercially without purchasing a license and without limitation as to the number of commercial fishermen, restrictions that apply to other citizens. Wash. Rev. Code §§ 75.28.450 *et seq.*

The court of appeals' "co-tenancy" reasoning fares no better than Judge Boldt's misreading of the language and purpose of the treaties. As that court conceded on the second appeal (*see* 573 F.2d at 1128 n.3) and as Judge Kennedy's separate opinion explains (*see id.* at 1134-36), the treaties hardly established a formal co-tenancy subject to the rights and incidents of a co-tenancy at common law. Nothing in the negotiation or language of the treaties indicates that the parties intended that those rights and incidents would govern their relationship. Nor is there any reason to believe that they would have adopted this model if they had focused on the possibility of the resource being depleted. On the contrary, as the State's brief persuasively shows (at 31-35, 48-56), the whole notion of an apportionment of fishing opportunities was foreign to *both* sides. The Anglo-American tradition contemplated non-exclusive access rights to common fisheries, and although the Indians understood a right to common participation in tribal property, this was very distinct from the common law concept of a divisible co-tenancy. *See* F. Cohen, *Handbook of Federal Indian Law* 183 (1942).

There is a more fundamental error in the court of appeals' approach than its historical inaccuracy. This Court has settled that, consistently with the Stevens treaties, the State may regulate fishing by both treaty Indians and non-Indians in the interest of conservation, provided that the regulation is non-discriminatory. *Puyallup I*, 391 U.S. at 398-99. *See also New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563-64 (1916). The Court has only sustained an apportionment of fish when the particular conservation measures adopted actually discriminate against Indians by imposing burdens that fall more heavily on them than on non-Indians. "There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed." *Puyallup II*, 414 U.S. at 48. The case now before the Court, however, involves no disproportionate burdens on Indians. Quite the contrary is true.

Under this Court's decisions, the State is charged with authority to regulate intra-state fishing in the interest of conservation, as long as it does not discriminate. Under the court of appeals' reasoning, however, the federal courts are required, upon application by treaty Indians, to "partition" the taking of all fish. In effect, the court's co-tenancy rationale takes what this Court adopted as a limited, judicial remedial measure for specific instances of discrimination and extends it to govern the full scope of all fishing activities in the State. The co-tenancy analogy thus misallocates to the federal judiciary the regulatory authority that properly belongs to the State.[22]

* * *

The federal courts below have shut their eyes to what the text of the Stevens treaties, the history of their negotiation, constitutional considerations, and simple common sense all show. If they have done so in an effort to remedy some perceived injustice to the Indians, they have exceeded the limited role assigned to the judiciary. "We attempt," this Court has affirmed, "to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945) (footnote omitted). "[E]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice . . . ." *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943).

This must be especially so here, where any apportionment program infringes on the right of others "to hold specific private

[22] *Compare Arizona* v. *California*, 373 U.S. 546, 597 (1963), where this Court held that the doctrine of equitable apportionment as a method of resolving water disputes between states did not apply to disputes between a state and an Indian reservation, in part because those disputes were to be decided according to federal legislation and Executive Order and not judicial discretion.

employment and to follow a chosen profession free from unreasonable governmental interference . . . ." *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959).

II. THE DISTRICT COURT'S PLANS FOR ADMINISTERING THE STATE'S FISHERIES EXCEEDED ITS CONSTITUTIONAL AND EQUITABLE POWERS.

The foregoing analysis shows why the predicate for any apportionment in this case is illusory. Even if there were some basis in the treaties for declaring that Indian fishermen are entitled to more than an equal opportunity to fish, the orders entered by Judge Boldt, and sustained by the court of appeals with varying degrees of enthusiasm or hesitance, cannot be justified.

A. Even If An Apportionment Of Fish Were Permissible, The Particular Apportionment Adopted Below Cannot Be Sustained.

The apportionment formula that Judge Boldt imposed on the state fishing industry requires a complicated series of manipulations to determine the amount of fish that the Indians and the non-Indians may each harvest. *See* pp. 6-16, *supra*. Only one premise reconciles these various manipulations: "heads-the-Indians-win, and tails-the-non-Indians-lose."

1. *The 50-50 Split.* The basic 50% allocation chosen by the courts below is both unprincipled and inequitable. "Sharing equally the opportunity to take fish," which is what Judge Boldt held the treaties to require, surely does not translate into an even split of the fish. As any fisherman knows, the size of each catch depends upon individual effort, skill, and luck, even where there is the same opportunity to fish. What the courts below have done is to guarantee a disproportionate rate of success for certain Indian fishermen.

As Judge Kennedy's opinion below demonstrates, the court of appeals' "co-tenancy" also is an inappropriate guide to "determine what share of the disputed rights should be allo-

cated to each of the parties." 573 F.2d at 1135 (concurring opinion). The factors relied on by the court of appeals in upholding a 50-50 split on the first appeal fail, too, to furnish any principled ground for decision. The court sustained this split in part because of "the equality between the two bargaining parties." 520 F.2d at 688. Yet the formal equality between the United States and each "tribe" hardly provides any assurance that the parties would have settled on a 50-50 division if they had agreed to an apportionment at treaty times. Even if, contrary to the historical record, the parties had settled on an apportionment, it seems far more likely that they would have agreed to divide the fish according to the ratio of their respective fishermen or general populations at any given time. There is not a shred of evidence to suggest that, if this issue had been addressed, the United States would have conceded an allocation of at least half the harvestable fish, coupled with a power to *exclude* non-Indian fishermen.[23]

The court of appeals concluded that the Indians' view of fishing rights as communal property also supports an even allocation. As an historical proposition, the court's view conflicts with the expert anthropological evidence in the record that "[w]hat an individual [Indian] caught and dried was his own." JA 259. It also ignores this Court's holding in *Winans* that the Indians' treaty fishing rights are personal rights. 198 U.S. at 381. Even more importantly, it blinks at the fact that "[t]he individual [Indian] fishermen [today] keep the proceeds of their fish sales, and this money is not shared with the tribe." *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wash.2d 664, 548 P.2d 1058, 1079 (1976) (concurring opinion). *See also* JA 538-41.

Finally, Judge Boldt's own overall 45-55 apportionment for 1977 concretely dramatizes that there is nothing in the treaties to support an even division. Indeed, in sustaining that

[23] Significantly, the "tribes" with which the United States entered into treaties were artificially created out of smaller bands and did not even exist before negotiations were begun. JA 108 (FF 17-18).

allocation, the court of appeals candidly stated that "[t]he numbers question is one of degree, *not* one of principle." 573 F.2d at 1130 (emphasis added). *See also* 520 F.2d at 688 ("[t]he district court was not required to decree a perfect 50-50 division of fishing opportunity"). The appellate court's holding on both appeals that Judge Boldt could exercise "a great amount of discretion" in fashioning and managing the "details" of the apportionment, 520 F.2d at 687; *see also* 573 F.2d at 1129, of course, concedes that no allocation ratio can be extracted from the treaties themselves.

With the unfounded reasoning of the lower courts cleared away, the inequity of the 50-50 apportionment is evident from the astounding disparity between the catch allowed individual fishermen. However the comparison is made—whether by the ratio of general populations, total fishermen, or merely commercial fisherman—treaty Indians are entitled under the apportionment to a disproportionate share of the State's resource. Indeed, according to the figures appearing in the district court's decision, 794 treaty Indians who engage in fishing are entitled under this apportionment to at least as many fish as approximately 6,600 commercial and 283,650 recreational non-treaty fishermen combined.[24]

2. *The Fish Subject to Apportionment.* Judge Boldt's allocation formula calls for the Indians to take 50% of the salmon that, *absent harvest en route*, would be available for harvest at the Indians' customary fishing grounds. The formula thus effectively reduces the freedom of non-Indians to fish in waters that the Indians did not frequent at treaty times. The State in its brief has cogently explained that this misconceives the right reserved to the Indians in the Stevens treaties by

[24] This degree of disparity may also jeopardize the resource itself. Since both over- and under-harvest of anadromous fish may endanger the run, it is desirable that all fish be taken that are not necessary for optimum escapement. *See* JA at 162-63 (FF 171). This, however, will not occur if Indians are allocated so much that they are unable to harvest their share or if non-Indians are provided so little that their incentive and ability to fish at all disappear.

ignoring the treaties' geographical limitation of off-the-reservation fishing rights to the Indians' "usual and accustomed grounds and stations" and by treating the right to engage in fishing as a right to the fish themselves.[25]

But even if Judge Boldt's approach were correct, consistency would require that fish taken on the reservation that would otherwise migrate through a common fishery at the Indians' customary sites be included in the total to be apportioned. Consistency would also require that fish landed by Indians in the all-citizen fisheries before running through the common fishery be counted toward their share. Yet under Judge Boldt's formula no fish taken by the Indians on the reservation are subject to apportionment, and no fish caught by treaty Indians outside the common fishery are counted in calculating their "50%" entitlement.

3. *Fish Taken on the Reservation.* Both courts below held that the apportionment did not extend to any fish taken on the reservation because the Indians' right to fish there is exclusive. This Court settled in *Puyallup III*, however, that exclusive geographical fishing rights do not afford the Indians freedom to fish on the reservation without regard to the treaty rights of others. The Court stated emphatically that the Indians do not enjoy "untrammeled on-reservation fishing rights" and are not free to "interdict completely the migrating fish run"; otherwise, the Indians could "totally frustrate . . . the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek." 433 U.S. at 176 (footnote omitted). Once again, therefore, the apportionment decreed below impermis-

[25] "[T]he Indians' reserved right, like all rights of fishery recognized in the common law, is defined by and attached to real property — their 'usual and accustomed grounds and stations.' By its nature, the right does not consist of an interest in the fish themselves that would entitle the Indians to restrain the lawful exercise of fishing rights by nontreaty citizens at the same locations. A fortiori the right reserved does not establish any cognizable interest in the fish or lawful fishing activities outside the boundaries of the 'usual and accustomed grounds.'" Br. of Petitioner State of Washington at 53.

sibly stacks the deck. Not surprisingly, the record demonstrates that the exclusion only serves to encourage the Indians to concentrate their fishing activities on the reservation so as to increase their over-all share of the harvest. *See* JA 234-35, 253-54.

Although Indians today are entitled to fish wherever others are, they had no such right when the treaties were negotiated. The Indians reserved the right under the treaties only to fish on the reservation or at their accustomed grounds; elsewhere the fishing rights of citizens were exclusive.[26] As a result, there is a plain lack of equity in now establishing a system of apportionment that allows the Indians to take fish on the reservation free from apportionment on the basis of exclusive fishing rights, while at the same time charging against the apportionment for other fishermen (a) the fish that they harvest in waters that the Indians did not frequent at treaty times, and (b) fish taken by non-Indians outside the State's regulatory jurisdiction.

4. *Fish Taken for Subsistence or Ceremonial Purposes.* Judge Boldt also exempted from apportionment fish taken by the treaty Indians for subsistence or ceremonial purposes. Although these uses may have been and may remain important to the Indians, the Stevens treaties reserve no special rights to the Indians for these purposes. Subsistence fishing may be no less significant for many non-Indians, but there is no special treatment for them.

5. *Hatchery-Reared Fish.* Judge Boldt has effectively required that the apportionment extend to fish artificially propagated at the State's expense. Yet it seems obvious that the Stevens treaties do not obligate the State in planting fish to subsidize Indian any more than non-Indian fishermen, which is precisely the effect of Judge Boldt's orders. As the state courts reasoned on the remand of *Puyallup II*, the absence of any

[26] The treaties predate the adoption of the Fourteenth Amendment, and the Fifth Amendment's due process clause was not held to incorporate equal protection principles until *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

artificial anadromous fish propagation at treaty times makes it "inconceivable that either the tribe or the government intended the Treaty to create any rights beyond the natural run." *Department of Game* v. *Puyallup Tribe, Inc., supra,* 548 P.2d at 1071.[27] In short, there is nothing in the treaties that can give Indians any greater claim than non-Indians to hatchery-reared fish paid for by the State.[28]

6. *Failure to Exercise Sound Discretion.* We have shown that a discretionary apportionment program fundamentally misconceives the Stevens treaties and the proper role of the judiciary in enforcing treaty fishing rights. We have also shown that the allocation formula ordered by Judge Boldt here is incorrect, internally inconsistent, and biased. But even if all of this were not so, the district judge's program still could not be sustained.

The court of appeals ruled that "[t]he district court has a great amount of discretion . . . in . . . devising the details of an apportionment . . . ." 520 F.2d at 687. It obviously follows from this premise that the trial court should actually have exercised discretion in adopting its allocation formula; the court should have weighed all relevant factors, disregarded any irrelevant considerations, and then struck an equitable balance. As Mr. Justice Douglas has stated:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to

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[27] Significantly, all but one of the Stevens treaties adopt this line of demarcation by expressly prohibiting the Indians from taking "shellfish from any beds staked or cultivated by citizens." *Id. See* Pet. 78-119, at A131-34. The exception is the Treaty with the Yakimas, who occupied territory where shellfish were not found.

[28] The provisions discussed in the text are not the only offensive features of Judge Boldt's apportionment program. Among other things, his 1977 and 1978 orders seek to effectuate the apportionment through the regulation only of non-Indian commercial net fishing. Despite the fact that the law requires "equality of burdens upon those in like situation or condition," *South Carolina ex rel. Phoenix Mutual Life Insurance Co.* v. *McMaster,* 237 U.S. 63, 72-73 (1915), the State's recreational fishermen are not required to contribute to the Indian share in any way.

> the necessities of the particular case. . . . The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944).

Yet one searches Judge Boldt's pronouncements in vain for any intelligible weighing of the equities at any time in the course of his management of the apportionment program. The Judge originally decided upon a 50-50 split as a matter of treaty interpretation and not the exercise of any discretion at all. 384 F. Supp. at 343. Even when he deviated from this conclusion in 1977, he acted only on the basis of unexplained "facts, circumstances, and equities." Pet. No. 77-119, at A44. Judge Boldt's June 6, 1978, decision reverting to the 50-50 division for 1978 and subsequent seasons is similarly bereft of any explanation of the allocation now in effect. *See* JA 479-91.

Even the court of appeals has conceded that there are "equities that lie on the side" of the non-treaty fishermen in this case. 573 F.2d at 1130. Yet Judge Boldt has totally ignored the great disparities in individual treatment and the economic hardships caused by his orders. Indeed, despite the fact that the Gillnetters and the Purse Seiners were not parties to the proceedings that culminated in the 1974 decree, he expressly ruled in issuing the June 6, 1978 "preliminary injunction" that since "[t]he rights of the treaty and non-treaty fishermen have already been adjudicated, . . . economic disruption associated with implementing the 1974 decree is *not* legally cognizable." JA 483 (¶ 4) (emphasis added).

The decisions of the two lower courts have been two ships passing in the night. Judge Boldt has founded an elaborate apportionment program affecting the vital interests of numerous fishermen on a conclusion of law concerning treaty interpretation that even two judges of the Ninth Circuit panel below doubt is supportable. The court of appeals, on the other hand,

has affirmed this action as an exercise of discretion when neither in form nor in substance has equitable discretion been exercised. Thus, even on its own theory of the case, the court of appeals' affirmance cannot be sustained.

B. The District Court Lacked The Power To Enforce The Treaties By Imposing Detailed Allocations In The Absence Of Implementing Legislation By The Federal Government Or By The State Of Washington.

The district court also overstepped its legitimate function by undertaking to implement the general language of the treaties by supplying its own detailed and comprehensive instructions for the conduct of fishing in the State of Washington. By a series of orders, the district court has pyramided its own notions about how treaty Indians and non-treaty Indians should be allowed to fish "in common with" each other and has wound up acting as a super-legislature without any guidance from either Congress or the legislature of the State of Washington. It is impossible to view the Stevens treaties as sufficiently self-executing to provide authority for the district court's elaborate plans and decrees, and the court's extravagant enterprise surely exceeds any proper role for the federal courts in enforcing treaties.

We are aware of no case in which any federal court has undertaken to make so many detailed *affirmative* judgments about how a treaty should be implemented. Properly, those decisions are left to the executive and legislative authorities, with the judicial role confined to a determination whether the governmental action (or private conduct) *violates* some specific provision of the treaty. *See, e.g., Puyallup I, II, and III.*

The role of the courts in enforcing treaties has long been regarded as a relatively modest one, because treaties—unlike statutes—are often not self-executing at all. *See Foster* v. *Nielson,* 27 U.S. (2 Pet.) 253, 314 (1829). Normally, as Chief Justice Marshall explained there, a "treaty addresses itself to the political, not the judicial department; and the legislature

must execute the contract before it can become a rule for the court." *Id.* These principles apply in equal measure to treaties with Indian tribes. *Cf. Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831); *National Indian Youth Council* v. *Bruce,* 485 F.2d 97 (10th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974). *See generally* F. Cohen, *Handbook of Federal Indian Law* 34 (1942).

Ordinarily, the performance of the commitments made in a treaty is a "political question" beyond the jurisdiction of the federal courts either to review or to enforce.[29] For these reasons, there is a virtual presumption that, in the absence of implementing legislation, the federal courts have no authority to determine how a treaty should be carried out. As the Court of Appeals for the Second Circuit recently explained in *Dreyfus* v. *Von Finck,* 534 F.2d 24, 29-30 (2d Cir.), *cert. denied,* 492 U.S. 835 (1976):

> "[The treaty] may also contain provisions which confer rights upon one of the contracting parties which are capable of enforcement as are any other private rights under the law. . . . In general, however, this is not so.
>
> "It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights. . . . Indeed even where a treaty is self-executing, Federal jurisdiction under [28 U.S.C.] Section 1331 will not lie where it is not provided for in the treaty." (Citations omitted.)

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[29] *See, e.g., Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 302 (1918); *Chae Chan Ping* v. *United States,* 130 U.S. 581, 602 (1889) (*Chinese Exclusion Case*); *Dreyfus* v. *Von Finck,* 534 F.2d 24, 29 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976); *National Indian Youth Council* v. *Bruce, supra,* 485 F.2d at 99.

See also Schlesinger v. *Reservist Committee to Stop the* War, 418 U.S. 208 (1974); *Baker* v. *Carr,* 369 U.S. 186 (1962); *Jensen* v. *National Marine Fisheries Services,* 512 F.2d 1189 (9th Cir. 1975); *Robertson* v. *General Electric Co.,* 32 F.2d 495 (4th Cir.), *cert. denied,* 280 U.S. 571 (1929).

Treaties may, of course, create justiciable rights. Specifically, if the treaty provisions are self-executing, or if a non-self-executing treaty has been executed by implementing legislation, a federal court may enforce it as it would any other statute. *Z&F Assets Realization Corp.* v. *Hall,* 114 F.2d 464 (D.C. Cir. 1940), *aff'd,* 311 U.S. 470 (1941); *People of Saipan* v. *United States Department of Interior,* 502 F.2d 90, 97-98 (9th Cir. 1974), *cert. denied,* 420 U.S. 1003 (1975). To be self-executing, however, the treaty must be clear, definite and mandatory in terms of the rights to be enforced, rather than provide merely general policy language.[30] In *People of Saipan, supra,* 502 F.2d at 97, the Ninth Circuit set forth some of the considerations involved in determining whether a treaty provision is self-executing:

> "The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self or non-self execution. . ." (Citations omitted.)

Applying these guidelines to the Stevens treaties, the courts below should have concluded that it was not their proper function to develop a comprehensive scheme to implement the "common" fishing rights of treaty Indians and non-treaty fishermen. Congress has not passed any implementing legislation on this subject that provides a basis for an apportionment

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[30] *Cf.* Restatement (Second), *Foreign Relations Law of the United States* § 141 (1965): "(1) A treaty made on behalf of the United States . . . that manifests an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States (a) is self executing . . . ."

of fish or that justifies federal judicial control over state fisheries. Nor has the State of Washington. While state authorities have developed mechanisms that generally regulate fishing in the State's waters and have embarked on various conservation measures, they have not undertaken to go beyond that non-discriminatory objective. Indeed, the Washington State Department of Fisheries lacks the statutory authority to promulgate regulations to allocate fish to specific fishermen or groups of fishermen for non-conservation purposes. *E.g., Puget Sound Gillnetters Association* v. *Moos,* 88 Wash.2d 677, 565 P.2d 1151 (1977).

In the absence of action by either Congress or the Washington legislature, it was not up to the district court to decide how to structure the complex economic, political, social, and cultural interests affected by the Stevens treaties.

The federal district court is not an appropriate institution to supervise fisheries management. As recognized in *People of Saipan, supra,* implementation of a treaty on a subject that depends on a large number of policy choices and requires a high degree of technical expertise and administrative supervision is not the proper function of a federal district court, at least in the absence of clear language in the treaty or implementing legislation assigning that unusual role to the court. A reading of the State's description of the intricacies of administering these major fisheries (Br. at 19-28) vividly illustrates why Judge Boldt was unwarranted in charting the course that he has pursued.

The history of Judge Boldt's involvement in this case surely demonstrates that enforcement of the Stevens treaties requires the making of basic policy choices. Most fundamentally, Judge Boldt has decided that the treaties are self-executing. Acting on that premise, he concluded that the treaties confer on the signatory tribes the right to an equal division of the resources, and he constructed the 50%-plus allocation accordingly. He

also concluded that the individual members of those tribes have judicially enforceable rights under the treaties.[31]

Despite these decisions about the self-executing effect of the treaties, the district judge has also decided that the other fishermen, both collectively and individually, can be denied their right under the treaties to fish "in common with" the treaty Indians. This is the plain result of his decision to close off commercial fishing by non-treaty net fishermen on all but a few days of the year, while allowing the treaty Indians to fish virtually at will. The results of that "judicial" election have been predictably disasterous.[32]

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[31] The United States itself, however, has asserted in a related litigation pending in the Ninth Circuit that fishing treaties do not necessarily confer judicially enforceable rights on fishermen. In *Purse Seine Vessel Owners Ass'n, et al.* v. *United States Department of State, et al.* (9th Cir. No. C77-471M), the United States has stated on page 28 of its brief:

"The nonjusticeable nature of plaintiff's suit is not affected by their claim to protection of their rights under the convention with Canada. In the first place, the convention does not guarantee any rights to U.S. fishermen as individuals, it merely authorizes U.S. fishermen as a whole to take up to fifty percent of the fishermen as individuals, it merely authorizes U.S. fishermen as a whole to take up to fifty percent of the harvestable catch. Certainly, plaintiffs do not possess anything approaching the level of constitutionally protected property rights."

[32] As simply one illustration of the chaos resulting from Judge Boldt's displacement of the State as sole manager of the State's salmon resource, we call the Court's attention to one of the consequences of the Judge's decision to allow the treaty Indians to be essentially self-regulating.

In his separate opinion in *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 76 (1962), Justice Douglas described at length why "fish traps"—which the Court there upheld the authority of the State of Alaska to prohibit Indians from using—are a "nefarious" device whose "notorious" destructiveness can have a "devastating effect" on a state's economy. 369 U.S. at 77-79. In this light, it is easy to understand why the State of Washington has banned the use of fish traps. Wash. Rev. Code § 75.12.060.

Judge Boldt's involvement has also embroiled him in an exceptionally high volume of administrative activity, and he has resorted to unorthodox innovations in order to formulate and execute his notions of the proper assignment of the benefits and burdens. Just to list a few of the questionable mechanisms he has employed, we note that:

He has seen fit to designate himself as, in effect, the State Fisheries Commissioner.

He has appointed his own Fishery Advisory Board.

He has inaugurated a special telephone "hot line" with recorded messages informing non-treaty fishermen whether they are eligible to fish.

He has decided to extend treaty privileges to Indians not covered by the treaties so long as they have a certain "blood quantum" or are "invited" to fish by treaty Indians.

He has enlisted an array of federal administrative and law enforcement agencies into the execution of his constantly evolving master plan.

He has ordered enforcement officials to board fishing vessels to investigate "suspected" violations of his decrees.

He has required fishermen to allow themselves to be photographed by the boarding officials and decreed the arrest of any fisherman who declines to exhibit a special identity card that the Judge requires all fishermen to carry.

It is difficult to imagine a federal court straying more boldly from its properly limited role under the general language of a treaty. By contrast, for example, in *United States* v.

Now that Judge Boldt has exempted treaty tribes from the regulations of the State of Washington and allowed them to be self-regulated, fish traps are being operated on Puget Sound. *Cf.* Tr., April 6, 1978, at 299. The court's allowance of these destructive devices compounds the economic hardship inflicted on the non-treaty commercial fishermen and directly undermines an important and legitimate state policy.

Winans, 198 U.S. 371 (1905), the Court held simply that an individual Indian was entitled to the "right of taking fish at all usual and accustomed grounds and stations." That right "is secured" expressly in the treaties, and interference with it can be easily declared and directly enjoined. The judicial enforcement of access to usual grounds poses no particular difficulty. Here, however, the district court has established a comprehensive and seemingly perpetual fishery management plan on the basis of vague, general language in a compact over a century old. This endeavor has brought him into a series of direct clashes over political questions that the judiciary should avoid.

We respectfully submit that in pursuing his cause, Judge Boldt has crossed the line that separates judicial decisions from legislative choices and, indeed, has contravened the only explicit congressional policy judgment in this area. Frustrated by the failure of the State of Washington to enact fishing regulations that he deems appropriate, Judge Boldt has taken over the management of the salmon fishery. This was not done in compliance with specific legislative guidelines promulgated either by the State or by Congress, and in fact runs counter to the judgment made by Congress in the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, which expressly reserves to the states their traditional right to control fisheries within their boundaries. That congressional judgment explicitly applies to fishing for anadromous fish like salmon that pass into and out of federal jurisdiction. *See* 16 U.S.C. § 1856(a).[33]

This Court has consistently recognized the constitutional restrictions upon the powers of the federal courts to usurp what

[33] This Act reinforces this Court's rejection of prior efforts by the federal government to regulate state fisheries. *See, e.g., New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 64 (1962). The prior decisions of this Court construing the Stevens treaties, including *Puyallup I, II, III*, have settled that it is the basic right of the State of Washington to manage its fisheries.

are essentially legislative responsibilities.[34] The Court has, for example, refused "to propose regulatory schemes for the States," even where constitutional rights are involved, because the proper judicial function is "to await their concrete legislative efforts." *Miller* v. *California*, 413 U.S. 15, 25 (1973). Judge Boldt's master plan and its implementing orders constitute just such a regulatory scheme, superimposing duties on state officials unauthorized by the state legislature and preempting state authority where Congress has decided to preserve it. The federal judiciary has no power to create a program of regulation to be implemented by a state or federal agency in this way.

There are no prior instances in which federal judges have arrogated such powers under Indian treaties, but in other contexts this Court has been prompt and firm in warning district judges to avoid entanglements that turn on non-constitutional policy judgments or require excessive administrative innovation and supervision. Instead, the lower courts have been told to recognize the primary responsibilities of legislative and administrative authorities.[35] The district judge here erred in making his own choices.

C. A Federal District Court May Not Mandate That State Officials Act Affirmatively In Excess Of Their Authority Under State Law.

Framed with special clarity in No. 77-983, the case coming from the Supreme Court of Washington, but implicit in the federal cases too, is the question whether the federal court could

[34] *E.g., Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 690 (1968) (it is not the province of the Court to draft legislation); *Collins* v. *Hardyman*, 341 U.S. 651, 663 (1951) (it is not for the Court to compete with Congress or attempt to replace it); *Doe ex dem. Poor* v. *Considine*, 73 U.S. (6 Wall.) 458, 480 (1868) ("Our function is to execute the law, not to make it").

[35] *See, e.g., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 410 (1977); *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 741-44 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Burns* v. *Richardson*, 384 U.S. 73, 84-85 (1966).

lawfully direct state agents to implement the treaty by performing official functions that they lacked authority to perform under state law.

Judge Boldt has ordered officials of the Department of Fisheries, a statutory agency of the State of Washington, to promulgate and enforce regulations for the purpose of allocating the harvest of fish in Puget Sound between treaty Indian fishermen and non-treaty fishermen in accordance with that court's interpretation of various treaties.[36] The Supreme Court of the State of Washington, however, has held unequivocally that, as it interprets various Washington statutes,[37] the Department of Fisheries has the power to regulate the taking of fish *only* for the purpose of conservation. The state court further explicitly declared that officials of that Department have not been vested by state law with the authority to allocate the harvest of fish in order to facilitate a federal court's interpretation of an Indian treaty.[38]

This definitive interpretation of state law by the Washington Supreme Court is, of course, binding on the federal courts. *See Mullaney* v. *Wilbur*, 421 U.S. 684, 690-91 (1975); *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961).[39] The state court decisions represent a clear limitation on the power granted by

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[36] *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *United States* v. *Washington*, 573 F.2d 1123 (9th Cir. 1978) [Nos. 78-119 and 78-139 before this Court].

[37] *See* Wash. Rev. Code §§ 75.08.012, 75.12.010, 75.08.080.

[38] *See Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977) [No. 77-983 before this Court]; *Purse Seine Vessel Owners Ass'n* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977); *Puget Sound Gillnetters Ass'n* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977) [No. 77-983 before this Court]. *See also Hartman* v. *State Game Comm'n*, 85 Wash.2d 176, 532 P.2d 614 (1975).

[39] *See also Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Board of Supervisors of Carroll County* v. *United States ex rel. Reynolds*, 85 U.S. (18 Wall.) 71, 81-92 (1873).

the State of Washington to officials of the Department of Fisheries. This Court is therefore faced with a stark confrontation between the authority of the federal court to issue mandatory injunctions to state officials, and the power of the State of Washington to limit the activities and authority of its officials.

Conflicts between federal and state authority such as that presented here require an examination of the very foundations of our federal system. It is a truism that a delicate balancing of interests is often required to ascertain the proper relationship between federal and state power. Indeed, this Court has recently demonstrated its sensitivity to encroachments on legitimate state sovereignty by the federal government, both in the case of congressional action,[40] and in the case of judicial decrees.[41] When the federal government seeks to impose affirmative mandates on the governments of the states, an even greater "awareness of the delicacy, and the difficulties of enforcement" of such mandates is required. *See* Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 515 (1954). *See also Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951). It is, of course, essential that there be such a "sensitivity to the legitimate interests of both State and National Governments." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). The maintenance of a "proper respect for state functions" assures that the "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, [will] always endeavor to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

The federal courts below, however, have failed to accord "proper respect" to what is clearly a state function—the delineation of the authority of state officials. By enjoining those

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[40] *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[41] *See Rizzo* v. *Goode*, 423 U.S. 362 (1976). *See also Juidice* v. *Vail*, 430 U.S. 327 (1977); *Hicks* v. *Miranda*, 422 U.S. 332 (1975); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Younger* v. *Harris*, 401 U.S. 37 (1971).

officials to act in excess of their legitimate authority, Judge Boldt has acted in a manner inconsistent with the most basic principles of federalism. The courts have consistently recognized the principle that state or local officials cannot be required to exceed their authority under state law. *See, e.g., Bell* v. *School Board of Powhatan County*, 321 F.2d 494, 499 (4th Cir. 1963); *Thaxton* v. *Vaughan*, 321 F.2d 474, 477 (4th Cir. 1963); *Wright* v. *County School Board*, 309 F. Supp. 671, 677 (E.D. Va. 1970), *rev'd other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); *Bradley* v. *School Board*, 51 F.R.D. 139, 142 (E.D. Va. 1970). Indeed, this Court has specifically held that mandamus does not lie to compel state officers to perform an official act that they are not authorized to perform by the laws of the state from which they derive their power. *See Missouri ex rel. Laclede Gaslight Co.* v. *Murphy*, 170 U.S. 78 (1898); *United States ex rel. Johnston* v. *County Court of Clark County*, 95 U.S. (5 Otto.) 769 (1878); *Board of Supervisors of Carroll County* v. *United States ex rel. Reynolds, supra.*

While federal courts may issue prohibitory injunctions against state officials to prevent them from interfering with federal rights, *see Ex Parte Young*, 209 U.S. 123 (1908), a federal court must be more circumspect in attempting to order a state official to act affirmatively. As one of the leading authorities on our federal system has noted:

> "Judicial mandates to non-judicial state officers to enforce either primary or remedial duties requiring the performance of affirmative acts are relatively infrequent. Lower federal courts may *prohibit* state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment."[42]

While mandatory injunctions do sometimes issue against state officials, most notably in desegregation cases, they do not

[42] Hart, *supra*, 54 Colum. L. Rev. at 516 (emphasis in original; footnote omitted).

purport to confer additional powers beyond those official responsibilities entrusted to them by the state.

In *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964), for example, this Court held that a federal district court had the power to order school officials, who had closed the public school system in order to avoid implementing a desegregation order, to reopen the system. The Court held that the district court was authorized, "if necessary to prevent further racial discrimination, [to] require the [county officials] *to exercise the power that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination, a public school system . . . ." *Id.* at 233 (emphasis added). Thus, even in the context of blatant and explicit racial discrimination, the Court has signified that a federal injunction is not available to order official action outside the scope of powers provided under state law. *See also Milliken* v. *Bradley*, 433 U.S. 267 (1977).[43]

In *Rizzo* v. *Goode, supra*, this Court overturned a district court injunction that required a local police department to put into effect a comprehensive program for improving the handling of citizen complaints. Moved by a concern for the principles of federalism, the Court viewed the decree as "an unwarranted intrusion by the federal judiciary into the discretionary authority committed to [police officials] by state and local law to perform their official functions." 423 U.S. at 366, 378-80. *See also O'Shea* v. *Littleton*, 414 U.S. 488 (1974). Clearly, it is a much greater intrusion for the federal judiciary to compel a state official not simply to exercise his discretionary authority in a particular way, but actually to assert authority that the state has not granted to him.

[43] In *Milliken* this Court approved, as part of a desegregation decree, a district court order requiring the implementation of and financing of remedial programs for children who were subject to past discrimination. Even there the Court was aware of a lurking Tenth Amendment and federalism problem, 433 U.S. at 291, but held the district court had acted within its powers because it had not attempted to restructure local government or mandate a particular method of financing. *Id.*

The district judge in this case, just as in *Rizzo*, has impermissibly interfered with the State's administration in an area of vital concern. The evidence in this case makes apparent the difficulty, complexity and delicacy of the management of the fishery resource in the waters of the Pacific Northwest. *See generally* Br. of Petitioner State of Washington at 19-24. As the State explains, efficient and effective conservation entails extremely detailed regulation, which must vary from area to area and from day to day. Conservation "crises" are frequent, and must be handled quickly and on a local level. In fact, in passing the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, Congress recognized the fact that effective conservation of fishery resources requires essentially local activity and control and, as we have previously noted, specifically did not preempt state authority over fishing in internal waters. 16 U.S.C. § 1856.

The State of Washington, in exercising its power over this essentially local subject of regulation, has determined that its regulatory agency with jurisdiction over fisheries should concern itself only with conservation and, indeed, should not be empowered to regulate the State's fisheries for any other objective. The federal court, however, has chosen to ignore this legislative judgment of the State in an area where the State clearly has primary authority. *See* 16 U.S.C. § 1856. Instead, the court has ordered state fishery officials to perform governmental functions that, according to the state supreme court, the Washington legislature has not empowered them to perform. This type of intrusion by a federal court into the internal workings of a state government is precisely the kind of judicial action found objectionable in *Rizzo*. It should not be countenanced here.[44]

[44] The State of Washington has taken a more or less neutral position on this issue, asserting only that it will implement (as it must) the decision of this Court. Br. of Petitioner State of Washington at 96. The position on this question taken by a state executive department cannot in any event be controlling. A state legislative judgment as to the authority of that department has been made, and has been unambiguously interpreted by the state supreme court. What is controlling in the federal courts are those legislative and judicial decisions.

The State has suggested that a decision of this Court that Indian treaty fishermen are not "of the same class" as non-treaty fishermen would undercut the state supreme court's decision in *Puget Sound Gillnetters Ass'n* v. *Moos*, *supra*, and *Washington State Commercial Passenger Fishing Vessels Ass'n* v. *Tollefson*, *supra*. Br. of Petitioner State of Washington at 97-99. We strongly disagree. The state court decided clearly—and independently of its reasoning concerning the interpretation of the treaty and the Equal Protection Clause—that state statutes vested the Department of Fisheries with the power to regulate for conservation purposes only. Any decision that this Court might render in this case could have no effect on either the reasoning or outcome of that aspect of the state court's opinions.

In this case the United States and the treaty Indians would have the federal courts by "judicial fiat" impose official responsibilities in "total disregard of state laws," *United States* v. *Yazell*, 382 U.S. 341, 349 (1966), even though those laws are in no way inconsistent with the federal constitution and consequently ought to be respected by the federal judiciary. To sustain the position taken by Judge Boldt would be to upset the delicate balance of state and federal authority so carefully set by this Court, and to compromise the underlying principles of federalism so jealously guarded in *Rizzo* v. *Goode*, *National League of Cities* v. *Usery*, *Younger* v. *Harris*, and many other cases.

III. DUE PROCESS BARS EXTENSION OF THE DISTRICT COURT'S INJUNCTIONS TO NON-TREATY FISHERMEN WHO WERE NOT PARTIES TO THE MAIN ACTION AND ALSO ENTITLES THEM TO CONTEST ISSUES THAT THE STATE MAY HAVE LITIGATED UNSUCCESSFULLY.

The remaining issues in this case need be reached only if the Court is otherwise inclined to sustain the lower court's interpretation of the Stevens treaties and to leave in force the district court's plan for managing the State's fisheries. The issues that the Court must then confront test the power of a

federal court to treat non-parties as bound by prior adjudications and to extend injunctions to persons who were not parties to the underlying litigation, who did not participate in the underlying litigation, and whose only connection with the proceedings is their status as citizens of the named party-defendant, the State of Washington.

In separate orders in August and September 1977 and June 1978, the district court took the extraordinary step of issuing injunctions running not against the State and its various agencies—the original named party-defendants in this litigation—but directly against all non-treaty fishermen, including by name petitioners Purse Seine Vessel Owners Association and Puget Sound Gillnetters Association. Most of the orders were issued *ex parte,* and the non-treaty fishermen were expressly denied the opportunity to contest the legal and factual foundation for the June 1978 order. Thus, without the opportunity for a hearing on the major, substantive issues involved in this case, the non-treaty fishermen have been subjected to rigid injunctive decrees whose economic impact has been, and continues to be, devastating. As documented by the United States National Marine Fisheries Service, Judge Boldt's decision has reduced by an average of from 60% to 85% the modest incomes of the men who for many years have earned their livelihoods as fishermen.[45] In addition, for a number of the non-treaty fishermen, the financial blow inflicted by the district court's orders has been compounded by prosecution and conviction for criminal contempt.

The orders extending the injunctions to non-treaty fishermen were affirmed by the court of appeals on the theory that these non-parties were in "privity" with the State of Washington, and that they were, therefore, bound by the orders to the same extent as the State. The appeals court concluded that the rights of the non-treaty fishermen were purely "derivative" of the State's power to regulate rights in the fish. As to claims that the State was not an adequate representative of the interests of

[45] *See* Br. of Petitioner State of Washington at 7-8.

the non-treaty fishermen, the appeals court stated bluntly that "any complaints the fishers may have . . . are matters between them and the State." *United States* v. *Washington,* 573 F.2d at 1133.

A. The State Was Not An Adequate Representative Of The Non-Treaty Fishermen.

The non-treaty fishermen, as non-parties to the original litigation in this case, cannot be bound by the results of that litigation, since they were not adequately represented by the State.

It is by now a truism that adequacy of representation is a constitutional prerequisite for the binding of non-parties. *See, e.g., Hansberry* v. *Lee,* 311 U.S. 32 (1940); *Chase National Bank* v. *Norwalk,* 291 U.S. 431 (1934). In *Chase National Bank,* for example, the Court held that "well-settled principles of jurisdiction" were violated where a mortgagee of certain property was barred from relitigating issues resolved in a prior suit against the mortgagor. 291 U.S. at 438. The Court held that "the facts and considerations affecting the [mortgagee's] rights may be different from those presented to the State court on behalf of the [mortgagor]." *Id.* at 439.[46]

Identical considerations apply here, since, as we show below, the non-treaty fishermen have independent interests and positions that differ from those of the State. Hence, it is legally irrelevant to the rights of the non-treaty fishermen that, in the original case, the district court actually reached conclusions with hostile implications for them over the opposition of the State.

In this case the lower courts not only have sought to preclude the non-treaty fishermen from asserting their legal and equitable claims about the interpretation and enforcement of the treaties, but, by summarily applying injunctions to them,

[46] *See also Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 691 (1961) (defendant class); *Gonzales* v. *Cassidy,* 474 F.2d 67 (5th Cir. 1973) (plaintiff not bound by earlier class judgment because of inadequate representation).

have exposed them directly to civil and criminal contempt. The due process principles reflected in *Hansberry* and *Chase National Bank*, where the Court's specific concern was with the binding effect on non-parties of *res judicata*, apply *a fortiori* to the effort to bind non-parties by injunction. In the absence of adequate representation, non-parties cannot be bound by injunction.

Without at least adequate representation, a judgment that purports to bind non-parties suffers from two constitutional defects. First, since there would be before the court no person standing in the shoes of the non-party, the court would lack *in personam* jurisdiction over the non-party—an essential requisite for the court's ability to bind a person, *see Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100 (1969); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Second, the non-party would be denied his right to a day in court and a meaningful opportunity to be heard, *see Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *cf. Crowell* v. *Benson*, 285 U.S. 22 (1932), since his interests will not have been pursued as vigorously as possible. *See* Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. Pa. L. Rev. 1217, 1228 n.46 (1975).

These due process concerns take on heightened significance in this case, since the lower courts without foundation have treated the original suit against the State of Washington as tantamount to a *defendant* class action, with non-treaty fishermen as the class members. Even apart from the many problems inherent in defendant class actions,[47] the facts here show why that analogy will not work. The State did not volunteer to serve as a representative of a class consisting of all its citizens; it was conscripted into that alleged role. *See Mudd* v. *Busse*, 68 F.R.D. 522, 529-30 (N.D. Ind. 1975). Moreover, the State did not become aware of any obligation to serve as a

[47] *See generally* Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

fiduciary, representing its citizens, until the decision below—long after adjudication of the issues that are critical to the non-treaty fishermen. As a result, the State felt perfectly free to adopt positions inconsistent with the interests and views of the non-treaty fishermen, and it did so.

In any event, the constitutional requirement of adequate representation requires nothing less than complete identity of interest between the State and the non-treaty fishermen. The issue, of course, is not the quality of the State's counsel or the adequacy of its defense of *its* interests. Rather the focus is on whether, as a matter of law, the State stood in the shoes of the non-treaty fishermen and was bound to serve as advocate for *their* interests. Viewed against that backdrop, the inadequacy of the State's alleged role as representative is apparent on both the theoretical and the practical level.

First, even assuming *arguendo* the soundness of the holding by the court below that non-treaty fishermen as citizens of the State were in "privity" with the State, that analysis proves too much. It follows necessarily from that analysis that the treaty Indians were *also* in privity with the State, since they are also citizens of the State and it is the status of citizenship that provided the basis for the court's holding as to privity. Thus, the logic of the privity analysis leads inescapably to the conclusion that the State, as party-defendant, was in privity with *both* sides of the present litigation—a conflict of interest as extreme and intractable as that found in *Hansberry*. Hence, the State's participation in the original litigation provides no more predicate for binding the non-treaty fishermen than it would have for binding the treaty Indians, if the original action had turned out differently.[48]

[48] The notion that non-treaty fishermen are in privity with the State for purposes of this litigation was also implicitly rejected by Justice Douglas in *Antoine* v. *Washington*, 420 U.S. 194, 208-13 (1975) (Douglas, J., concurring). In that case, in which the State was a party, the Court held that the State was barred from applying its game laws to Indians as a result of an 1891 treaty ceding certain Indian lands to the federal government. Justice Douglas stated that

Second, the State of Washington had both a legal and moral obligation to take positions in the original litigation that, in its view, accommodated the interests of *all* its citizens, including, of course, the treaty Indians. "The department [of fisheries] is given an affirmative duty . . . to authorize the harvesting of surplus [salmon], so as to fully utilize the harvestable portions for the economic well-being *of the citizens as a whole.*" *Puget Sound Gillnetters Association* v. *Moos,* 88 Wash.2d 677, 565 P.2d 1151, 1153 (1977) (emphasis added). The State's proper role was that of umpire of the public interest, not advocate for any contesting group. That was, in fact, the role it sought to exercise, and not surprisingly *neither* of the contesting groups was satisfied with its positions. It cannot be argued that the State has "represented" either group adequately, so as to bind them from independently asserting their own rights. Each group had, and has, divergent interests that the State could not singly represent.

There can be no question that the Gillnetters and Purse Seiners have substantial economic interests that exist independently of the interests of the State, of the treaty Indians, and of other commercial fishermen. They are entrepreneurs who have invested substantial sums in their vessels, nets and equipment, and who derive their principal source of income from fishing. In the State of Washington entry into the commercial fishery is

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the Indians' immunity from the game laws could not be confined to those areas of the ceded property that had remained public land.

At the same time, however, Justice Douglas stated that "[w]hether the result would be different if the contest were between the owner of the private tract and the Indian is a question that need not be reached." 420 U.S. at 212. If non-Indian citizens of the State are automatically in privity with the State when the State is a party to litigation involving Indian treaties, and automatically bound by the outcome, Justice Douglas would not have reserved the right of a non-Indian citizen to contend for a different outcome on the merits in a later litigation.

absolutely prohibited unless one purchases an existing license;[49] the market value of such a license, at least before the apportionment program ordered by the courts below, was approximately $3,800 in the case of a gillnet license and $16,000 in the case of a purse seine license.

There can be no doubt that the State did, in fact, attempt to advance the interests of various groups—including troller fishermen as well as sportsmen and charter boat operators—whose interests conflict with those of petitioners. Thus, for example, in connection with the 1977 and 1978 orders the State has not sought to increase the number of fish available to commercial fishermen by reducing the number of fish to be made available to sports fishermen; neither has the district court. This is not surprising, since recreational fishermen constitute a substantially larger number of persons, and consequently a far larger political force with which the State has to deal.

There are other examples of action or inaction by the State that actually conflicted with and undermined the interests of the non-treaty fishermen. The State chose not even to litigate the underlying treaty interpretation issue in *United States* v. *Oregon,* 302 F. Supp. 899 (D. Ore. 1969); it acceded to previous orders of the court as a condition of intervention there.

Indeed, during the original district court proceedings, and in clear conflict with the position and interests of the non-treaty

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[49] Wash. Rev. Code § 75.28.450 provides in pertinent part:

"*Limitation upon salmon licenses and delivery permits—Intention.* The legislature finds that the protection, welfare, and economic good of the commercial salmon fishing industry is of paramount importance to the people of this state. Scientific advancement has increased the efficiency of salmon fishing gear. There presently exists an overabundance of commercial salmon fishing gear in our state waters which causes great pressure on the salmon fishery resource. This situation results in great economic waste to the state and prohibits conservation programs from achieving their goals. The public welfare requires that the number of commercial salmon fishing licenses and vessel delivery permits issued by the state be limited to insure that sound conservation programs can be scientifically carried out."

fishermen, the State Department of Fisheries actually supported an apportionment. The department urged the court to "qualify the treaty right by reference to an objective, definite standard" to be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to the waters of the State of Washington in the case area." The Department then proposed that the treaty fishermen be alloted one-third of the runs originating in the rivers that they fish. Moreover, in the first appeal the State acquiesced in at least some aspects of Judge Boldt's apportionment formula, *see* 520 F.2d at 690, and in the second the State accepted without serious challenge the 45-55 overall allocation itself. *See* 573 F.2d at 1130. Indeed, state officials, pursuant to Judge Boldt's initial decision in this case, even brought enforcement proceedings against non-treaty fishermen.

In addition, during the course of this litigation, the Gillnetters and Purse Seiners as well as other commercial fishing interests have been embroiled in a continuous series of lawsuits against the State. The State has resisted demands by certain groups of commercial fishermen in favor of sportsmen, charter boat operators, and others,[50] and in one of the cases now before this Court, *State of Washington* v. *Washington State Commercial Fishing Vessel Association*, No. 77-983, the Washington Supreme Court granted mandatory relief sought by the non-

[50] *Oregon Gillnetters* v. *Moos*, Thurston County Cause No. 55339; *Schroeder* v. *Moos*, Thurston County Cause No. 55387; *Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson*, 87 Wash.2d 417, 553 P.2d 113 (1976), *on rehearing*, 89 Wash.2d 276, 571 P.2d 1373 (1977); *Hartman* v. *State Game Comm'n*, 85 Wash.2d 176, 532 P.2d 614 (1975); *Columbia River Fishermen's Protective Union* v. *Ray*, Thurston County Cause No. 58054; *Columbia River Fishermen's Protective Union* v. *Moos*, Thurston County Cause No. 55338; *Columbia River Fishermen's Protective Union* v. *Haw*, Thurston County Cause No. 56658; *Mariani* v. *Tollefson*, Thurston County Cause No. 46427; *Puget Sound Gillnetters Ass'n* v. *Tollefson*, Thurston County Cause No. 50757; *Purse Seine Vessel Owners Ass'n* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977); *Puget Sound Gillnetters Ass'n* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977).

treaty fishermen against the State. Moreover, even in this Court, the State is taking some positions that are decidedly at odds with the non-treaty fishermen, since it is prepared to concede, for example—despite the holding of the Washington Supreme Court in the case commenced by the petitioner associations—that its agents may be empowered by federal court orders to take actions in contravention of state statutes.

These conflicts are not trivial or speculative; they go to the heart of the State of Washington's alleged "representation" of the interests of the non-treaty fishermen. In light of the losses actually incurred by the non-treaty commercial fishermen, it is not difficult to see why they are convinced, with ample foundation, that it is a grotesque fiction to say they are bound by the outcome of the original litigation and are subject to the district court's decrees because the State "adequately represented them."

Where there have been similar conflicts, the federal courts have consistently recognized that due process does not permit a party to be treated as a legally adequate representative of non-parties, capable of binding them. The issue is most typically addressed in connection with proposed certifications as class actions. For instance in *Phillips* v. *Klassen*, 502 F.2d 362 (D.C. Cir.), *cert. denied*, 419 U.S. 991 (1974), class certification was denied because of the possibility that some members of the class would have different views or interests than the purported class representative: "Class members whose interests are antagonistic to, or even 'potentially conflicting' with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process . . . ." *Id.* Similarly, in *City of Chicago* v. *General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd on other grounds*, 467 F.2d 1262 (7th Cir. 1972), the City of Chicago was found to be an inadequate representative of all its residents because of the likelihood that some members of such an "extraordinarily diverse class" would have interests adverse to the city.[51]

[51] *See also Dierks* v. *Thompson*, 414 F.2d 453 (1st Cir. 1969); *Lukenas* v. *Bryce's Mt. Resort, Inc.*, 66 F.R.D. 69 (W.D. Va. 1975); *Ward* v. *Luttrell*, 292 F. Supp. 162 (E.D. La. 1968).

Manifestly, the same observation applies here. The State cannot be considered to have been an adequate representative of the interests of *one* of the conflicting groups of its citizens in this litigation. Under the circumstances, the effective destruction of the livelihood of the non-treaty fishermen by a litigation in which they did not have the opportunity to represent themselves is inconsistent with their fundamental rights. *Cf. Green* v. *McElroy*, 360 U.S. 474 (1959) (right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within liberty and property concept of Fifth Amendment); *Ferrell* v. *Dallas Indep. School Dist.*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968); *Fitzgerald* v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

B. Privity Is Not A Substitute For Adequate Representation.

The court below was of the view that adequacy of representation by the State was not a necessary predicate for holding petitioners bound by the earlier litigation and properly subject to the trial court's orders. It disregarded the fact of inadequacy by treating the supposed relationship of "privity" between the State and all its citizens as independently sufficient. In this respect as well the court clearly erred. Common law notions of privity are not substitutes for adequacy of representation. *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 2956, at 568 (West 1972 & Supp. 1977).

This Court has said that privity exists where the non-party is "identified in interest" with the defendant. *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945).[52] Thus, for purposes of binding a non-party, "privity" exists only where the relationship between the party and a non-party is characterized by such a high degree of common interests—and the absence of any

[52] *See also Backo* v. *Local 281*, 438 F.2d 176 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971); *Teas* v. *Twentieth Century Fox Film Corp.*, 413 F.2d 1263 (5th Cir. 1969).

conflicting or divergent interests—that adequacy of representation is assured. *See* C. Wright & A. Miller, *supra*, at 560.

The appeals court's reliance on several water rights decisions to support its privity holding was clearly misplaced, for in each of those cases the state was a legally adequate representative of the rights and interests of the absentees. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935); *Wyoming* v. *Colorado*, 286 U.S. 494 (1932). In *City of Tacoma*, for example, the Court suggested that the State of Washington's participation in an earlier Federal Power Commission proceeding operated as a bar to subsequent relitigation of the same issues in claims brought by the State or by any of its citizens. As the Court pointed out, however, due process safeguards were carefully observed in the agency proceeding and in a subsequent judicial appeal by the appointment of a special state attorney general with the responsibility for representing Washington citizens whose views were in conflict with those of the state. 357 U.S. at 326. Of course, there was no similar effort in this case by the State to serve as the undiluted advocate of the interests of non-treaty commercial fishermen.

In *Wyoming* v. *Colorado* and *Nebraska* v. *Wyoming*, this Court's original jurisdiction was invoked to settle disputes concerning the proper allocation of water between states. In both cases the Court held that a judgment binding a state was equally binding against private appropriators within the state. In relying on these cases, however, the court below overlooked the obvious fact that apportionment *between* states is quite different from resolution of the interests of competing groups of citizens *within* a single state. In the traditional inter-state water rights case, each state represents the interests of its citizens as a whole against the claims of another state and its citizens as a whole.[53] The interests of each state and its citizens are deemed

[53] Significantly, however, in *United States* v. *Nevada*, 412 U.S. 534 (1973), original jurisdiction of a suit was declined in favor of litigation in district court where the individual users of the water rights in dispute could intervene to assert their own interests.

to be coextensive, and thus there is an identity of interest. As we have seen, that is not true in this case. Inapposite for the same reasons are other decisions of this Court in which states brought suits as *parens patriae* on behalf of the common economic or environmental interests of their citizens. In each of these cases, too, there was a complete identity of interest between the state as *parens patriae* and all of its citizens.[54]

Moreover, the doctrine of *parens patriae*, orginally confined to the notion that the sovereign may represent those of its citizens legally incapable of acting for themselves, has developed to the extent that a state has standing to sue in those causes in which it has its own "quasi-sovereign" interest, different from those of its citizens. *See Hawaii* v. *Standard Oil Company*, 405 U.S. 251, 257-58 (1972). The quasi-sovereign interest has been characterized as an "interest independent of and behind the titles of [the state's] citizens . . . ." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), and as an "interest apart from that of particular individuals who may be affected," *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 451 (1945). This application of the *parens patriae* doctrine could not justify binding non-party citizens who have independent rights.

Finally, in *New Jersey* v. *New York*, 345 U.S. 370 (1953) (*per curiam*), this Court made the requirement of adequacy of representation explicit in its denial of an intervention motion by the City of Philadelphia. The State of Pennsylvania had previously been granted leave to intervene in the case—a water allocation dispute between New York and New Jersey. On a

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[54] *See, e.g., Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas); *Missouri* v. *Illinois*, 180 U.S. 208 (1901) (holding that Missouri was permitted to sue Illinois and the Chicago Sanitation District on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River). *See also North Dakota* v. *Minnesota*, 263 U.S. 365 (1923); *New York* v. *New Jersey*, 256 U.S. 296 (1921); *Georgia* v. *Tennesee Copper Co.*, 206 U.S. 230 (1907); *Kansas* v. *Colorado*, 206 U.S. 46 (1907).

subsequent motion by the City of Philadelphia the Court denied intervention because Philadelphia's interests were adequately represented by the State as *parens patriae*. "Counsel . . . have been unable to point out a single concrete consideration to which the [state's] position does not represent Philadelphia's interests." 345 U.S. at 374. Mere "privity" was not enough to exclude Philadelphia from representing its own interests.

In the cases now before the Court, the disputes have divided groups of citizens of the State of Washington with conflicting interests. In no fair or realistic sense can the state be regarded as speaking for each group or with any. That kind of schizophrenia is not recognized either by the "privity" doctrine or by the due process clause.

C. Non-Treaty Fishermen Are Not Affiliated With The State Of Washington For Purposes of Applying Injunctions To Them Directly.

Quite apart from the error in treating the non-treaty fishermen as bound by the substantive rulings against the State in the original litigation, Judge Boldt exceeded his authority in extending a series of injunctions to them as if they were parties to the litigation. Under principles of federal equity, as codified in Rule 65(d) of the Federal Rules of Civil Procedure, the type of "privity" that will permit the direct extension of an injunction to a non-party is quite limited and certainly does not exist in this case.

The basic principles governing the scope of federal court injunctions against non-parties were set forth by Judge Learned Hand in *Alemite Manufacturing Co.* v. *Staff*, 42 F.2d 832, 832. (2nd Cir. 1930):

> "[N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the whole world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not

vested with sovereign power to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court."

Contrary to any claim of expediency that might be offered to justify what Judge Boldt has done here, Judge Hand rejected the notion that an injunction may be extended to a non-party simply because the judge believes it is "necessary" to achieve his objective:

> "Thus the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, *but what it has power to forbid, an act of a party.*" *Id.* at 833 (emphasis added).

These limitations were approved and followed in *Chase National Bank* v. *Norwalk*, *supra*[55], involving an injunction against a city that also purported to bind all persons who might be given notice of the decree. The Court's opinion by Mr. Justice Brandeis held that the injunction was void insofar as it applied to state officials who were neither associates nor confederates of the defendant city. The Court stated that extension of the injunction to non-parties who "act independently and whose rights have not been adjudicated . . . violates established principles of equity jurisdiction and procedure."

The basic teaching of these cases was substantially codified in Rule 65(d) when the Federal Rules of Civil Procedure were adopted in 1938. Rule 65(d) provides in relevant part that a federal injunction or restraining order is

> "binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and *upon those in active concert or participation with them* who receive actual notice of the order by personal service or otherwise." (Emphasis added.)

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[55] *See also Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 180 (1973).

As this Court has explained, Rule 65(d) was intended to prevent injunctions from making "punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Golden State Bottling Co.* v. *NLRB*, *supra*, 414 U.S. at 180. An injunction can only run to parties and those "identified with them in interest [and] in 'privity' with them," and acting as "aiders and abettors," *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1944). Under Rule 65(d), mere "privity" in the common law sense is not enough. The rule requires active cooperation and complicity on the part of the non-party, or, alternatively, the existence of a common legal right linking the party defendant and the non-party.

The non-treaty commercial fishermen were certainly not acting "in concert" with the State, nor were they acting as the State's agents in this matter. Although both the State and the non-treaty fishermen believed that the major underpinnings of the federal decision were wrong, there was no concerted action in its aftermath of the type contemplated by Rule 65(d).

Moreover, the courts below did not rely on any notion of "active concert or participation" by the State and the non-treaty fishermen. Rather, the apparent rationale for the extension of the injunctions directly to the non-treaty fishermen was one of expediency. Judge Boldt expanded his injunctive net because the State could not effectively — or legally, under Washington law — allocate harvestable salmon the way the Judge wanted. For that reason alone, the court of appeals concluded, "the district court had authority to act against the fishers directly when it appeared that the State was unable to do so." 573 F.2d at 1133. That type of pragmatism, however, is precisely what Judge Learned Hand condemned in *Alemite Manufacturing Co.* v. *Staff*, *supra*. [56]

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[56] In its brief acquiescing in the grant of a writ of certiorari in Nos. 78-119 and 78-139 (at 25), the United States suggested that there is an analogy here to various cases arising in the context of judicially enforced school desegregation, where the federal courts have enjoined non-parties from forcible interference with their decrees. *See, e.g., Cooper* v. *Aaron*, 358 U.S. 1, 11-12 (1958); *United*

Apart from the absence of "concert" here, the non-treaty fishermen were not resting on a common legal right linking them and the State in a relationship sufficient to establish privity for purposes of Rule 65(d). Under Rule 65(d), an injunction can be extended to a non-party only where he is asserting the *same* legal right as the party or where he operates under the *identical* legal duty. A more tenuous relationship—like that between the State here and contesting groups of its citizens—is not sufficient. For example, in *Petersen* v. *Fee International Ltd.*, 435 F. Supp. 938 (W.D. Okla. 1975), a contempt proceeding growing out of a patent infringement case, the court held that an injunction barring the use of the infringing product did not bind a person who had purchased

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States v. *Hall*, 472 F.2d 261 (5th Cir. 1972); *Bullock* v. *United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 384 (1957); *Brewer* v. *Hoxie School Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956). The analogy is unfair; nor will it bear analysis.

In those cases injunctions were held to bind various "agitators"—non-parties to the underlying suits—who had deliberately sought to instigate violent confrontations or otherwise block implementation of school desegregation decrees. None of the injunctions or restraining orders, however, purported to adjudicate the non-parties rights in the underlying desegregation litigation. In fact, they did not purport to adjudicate or impose independent legal obligations. Rather, they did no more than direct the non-parties to stand aside so that the decrees could operate directly on the parties to the litigation, whether effectively or not. *See United States* v. *Hall, supra*, 472 F.2d at 264-67 (Wisdom, J.). Indeed, in *Hall* the court of appeals expressly recognized the non-party's right to contest the underlying decree. *Id* at 256.

In the present case, by contrast, the injunctions directed at the non-treaty fishermen may not fairly be characterized as merely ancillary to the underlying litigation or as merely protecting the court's jurisdiction. The orders were the product of Judge Boldt's frustration that directing his orders only against parties proved to be inadequate for his purposes. The school desegregation cases lend no support for that kind of bootstrapping.

the goods pursuant to a supply contract. The court emphasized the narrow scope of privity within the meaning of Rule 65(d):

> "In its broadest sense privity is defined as mutual or successive relationships to the same right or property, *or such an identification of interest of one person with another as to represent the same legal right* . . . . The meaning attached to the word 'privity' . . . in Rule 65 is the latter relationship, such an identification of interest of one person with another as to represent the same legal right and generally not the first relationship. *Id.* at 942 (emphasis added).[57]

The court below sought to link the rights of the State and the non-treaty fishermen by asserting that petitioners' interests were "derivative of" the State's sovereign power to regulate "rights in fish." 573 F.2d at 1132. It is clear that Judge Boldt did not proceed on this theory when he acted, rather than on a more result-oriented one; the district judge's orders were directed to non-citizens as well as citizens.[58] In any event, as we have just seen, a "derivative" relationship is normally insufficient by itself to support the extension of an injunction to a non-party. Moreover, the court's characterization of the relationship between the State and the non-treaty fishermen is meaningless in this context.

The notion that the rights in fish and game are derived from the State is fantasy. The fish are migratory, leaving

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[57] *See also Herrlein* v. *Kanakis*, 526 F.2d 252 (7th Cir. 1975) (injunction not enforceable against non-party which had purchased all the assets of the defendant and had hired defendant to manage those assets); *United Pharamacal Corp.* v. *United States*, 306 F.2d 515 (1st Cir. 1962) (purchaser of drug held not subject to injunction against production and sale, even though it owned 30 percent interest in the defendant corporation); *Swetland* v. *Curry*, 188 F.2d 841 (6th Cir. 1951) (injunction for nuisance against owners of airport not binding on city which took title to the airport through eminent domain).

[58] The "preliminary injunctions" of September 27, 1977, and June 6, 1978, are directed at "all . . . persons who attempt to net . . . salmon" (Pet. 78-119, App. A89; JA 488).

streams of Washington and British Columbia and swimming far out to sea. They are subject to being caught on the high seas by Americans and Canadians in accordance with treaty and federal regulation.[59] They then return to spawn in their streams of origin or to be caught by either Canadian or United States fishermen. While the fish are in state waters, they are no doubt a resource properly subject to regulation. But the State does not have such an interest in them, to the exclusion of others, that its participation in litigation can bind its citizens, non-citizens, or aliens.[60] A fishing license is simply a conservation device, also designed to raise revenue; it is not a royal permit that "derivatively" confers on the fishermen some right to the fish otherwise owned by the State.

Moreover, it would be fatuous to regard commercial fishermen as merely the beneficiaries of the largesse of the State, and to reason that they may take fish as if the fish were State property, available only under terms and conditions that the State has chosen to impose upon it. The court of appeals conceded, as it must, that the State of Washington does not have title to, or otherwise *own,* migratory fish swimming freely off the coast of the state.[61] As this Court noted in *Douglas* v. *Sea Coast Products,* 431 U.S. 265, 284 (1977) (quoting *Missouri* v. *Holland,* 252 U.S. 416 (1920)):

> "'[t]o put the claim of the State upon title is,' in Mr. Justice Holmes' words, 'to lean upon a slender reed . . . .' A State does not stand in the same position as the owner of a

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[59] Regulations of the Pacific and North Pacific Regional Councils are promulgated pursuant to the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*

[60] In *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948), this Court held that a state could not forbid the issuance of fishing licenses to aliens.

[61] The court of appeals itself recognized this principle in the first appeal in the federal proceedings:

"The district court's apportionment does not purport to define property interests in the fish; fish in their natural sense remain free of attached property interests until reduced to possession." 520 F.2d at 687.

> private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture." (Citations omitted.)[62]

Nor does the State's power to regulate fishing establish a legal identity of interest between the State and commercial fishermen. It defies common sense to equate the interests of the regulator with those of the regulated. If the court's analysis were sound, commerical fishermen—Indians and non-Indians alike—would be barred from ever challenging the State's regulatory decisions. The clear gulf between the State and its citizens in that context, however, permits such challenges and exposes the flaw in the lower court's analysis.

Thus, the rights and interests of non-treaty commercial fishermen, although subject to state regulation, stand quite independent of the State's sovereign rights. Accordingly, the identity of legal right required by Rule 65(d) simply does not exist here, and the district court lacked the power to extend its decrees to petitioners solely on the basis of determinations made in a lawsuit to which they were not parties.

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[62] This concept was also approved by the Court in *Toomer* v. *Witsell,* 355 U.S. 385 (1948), where the Court termed the "whole ownership theory" a mere fiction that illustrates the public interest in regulating fisheries.

CONCLUSION

The judgments of the Supreme Court of Washington should be affirmed. The judgments of the United States Court of Appeals for the Ninth Circuit and the extant "Preliminary Injunction" of the United States District Court for the Western District of Washington should be reversed.

Respectfully submitted,

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